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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~479~~ 10

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

MAURICE E. TRAVIS,

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v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit, Judge Murrah dissenting, which affirmed a judgment of the United States District Court for the District of Colorado, convicting petitioner, after a jury trial, on the four counts of an indictment charging violation of 18 U. S. Code, Sec. 1001, by the making and filing of two false affidavits under Section 9(h) of the Taft-Hartley Act, 29 U. S. Code, Sec. 159(h).

Opinions Below

The opinion of the court below and the dissent, App. A,[1] *infra*, p. 47, have not yet been reported.

[1] We use "App." to refer to the appendices to this petition.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on August 3, 1959 (p. 44).[2] A petition for rehearing was denied on August 21, 1959 (p. 50). On September 8, 1959, Mr. Justice Whittaker extended the time for filing a petition for writ of certiorari to and including October 20, 1959.

Jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

Questions Presented

1. Whether the trial court did not err in submitting the case to the jury because (a) the perjury rule of evidence is applicable to a prosecution for filing false affidavits under Section 9(h) of the Taft-Hartley Act and was not satisfied by the proof; (b) the evidence against petitioner consisted solely of his uncorroborated extrajudicial admissions subsequent to the alleged commission of the crimes charged; and (c) without reference to the foregoing, the evidence was palpably insufficient both as to the falsity and as to the materiality of petitioner's affidavits.

2. Whether the instructions of the trial court were not erroneous and prejudicial because (a) Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844, setting forth thirteen indicia of membership in the Communist Party is unconstitutional on its face and as applied in the instructions; (b) the court erred in other respects in instructing on the meaning of the terms "membership" and "affiliation"; (c) the court refused to instruct on the ap-

[2] References in this form are to the typewritten transcript of the proceedings in the court below. We use "R." to designate the printed record on the appeal to the court below.

plicability of the perjury rule of evidence; and (d) the court refused to instruct that petitioner could not be convicted unless the jury found that he believed himself to be a member of or affiliated with the Communist Party at the times he executed the affidavits.

3. Whether the trial court did not err in denying petitioner's motions for the production, to the defense or to the court for its inspection, of grand jury testimony about petitioner by witnesses for the prosecution who testified at the trial.

4. Whether the trial court did not err in applying 18 U. S. C. 3500(a) by ruling that the prosecution, not the court, determines what documents are "statements" and thus subject to production; (b) by refusing to order the prosecution to produce statements made by one of the witnesses to a Senate investigator and by all three witnesses to government attorneys; and (c) whether, as thus applied, Section 3500 violates the *ex post facto* and due process clauses.

5. Whether rulings of the trial court on the admission and exclusion of evidence were not erroneous and prejudicial.

6. Whether venue did not lie solely in the District Court for the District of Columbia where Section 9(h) of the Taft-Hartley Act required the affidavits to be filed and not in the District Court for the District of Colorado where the affidavits were made and mailed.

Statutes Involved

18 U. S. C. 1001; 29 U. S. C. 159(h) (Section 9(h) of the Taft-Hartley Act);[3] Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844; 18 U. S. C. 3500; and 18 U. S. C. 3237 are set forth in Appendix C.

Statement of the Case

The indictment and first trial.

Petitioner, then secretary-treasurer of the International Union of Mine, Mill and Smelter Workers (hereinafter called Mine, Mill), filed non-Communist affidavits in December, 1951 and December, 1952, with the National Labor Relations Board in Washington, D. C. The affidavits were executed by petitioner in Denver, Colorado, and were mailed from there to the Board in Washington, D. C. (R. 42-50; Govt. Exs. 1-6, R. 1242-47).

Petitioner was indicted on six counts, alleging that each of the two affidavits was false with respect to membership in, affiliation with, and support of, the Communist Party. The support counts were dismissed on motion of the government before petitioner's first trial (R. 19), when he was convicted on the four remaining counts. The conviction was reversed by the Court of Appeals because of improper cross-examination of petitioner's character witnesses. *Travers* v. *United States*, 247 F. 2d 130, App. B, *infra*, p. 78. The court held, however, that venue in Colorado was proper and gave directions to the trial court concern-

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[3] Repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257). However, the new statute provides that no person who is or has been a member of the Communist Party (or who has been convicted of certain felonies) may hold office in a union or be employed in certain capacities during or for five years after the termination of his membership in the Communist Party (or after such conviction or imprisonment therefor). Sec. 504(a).

ing instructions as to the meaning of membership and affiliation on any new trial. These matters are among those presented on this petition, *infra*, pp. 20, 40.

The evidence as to membership and affiliation.

It is undisputed that petitioner was a member of the Communist Party prior to 1949. The prosecution introduced a statement written by him and published in the Mine, Mill newspaper on August of that year announcing that he had resigned from the Party "in order to make it possible for me to sign the Taft-Hartley affidavit" (Govt. Ex. 8, R. 1249). The statement expressed petitioner's reluctance to take this step and his indignation at the provision of the law which made it necessary.

The theory of the prosecution was that petitioner's resignation was a pretense and that his membership continued beyond the date of the 1949 affidavit. However, there was no evidence that subsequent to the 1949 resignation, petitioner paid dues or made financial contributions to the Communist Party, attended Party meetings, carried out Party instructions, or considered himself bound by Party discipline.

The case for the prosecution rested entirely on the testimony of three witnesses: Eckert, Mason and Gardner.

Eckert's testimony related to the period from 1942 to 1948 when he had known petitioner as a fellow-Communist in Mine, Mill. Except for two matters, it established nothing of significance that petitioner did not concede and offer to stipulate—*i.e.*, that he had been a Party member prior to his 1949 resignation (R. 56-63). The first exception consisted of Eckert's assertion that the "policy of the Party was that once having joined the Communist Party you could not leave without being expelled" (R. 196).[4] The second was his testimony that in 1948, at a Communist

[4] The error in admitting this testimony is discussed *infra*, p. 33.

meeting where the policy of non-compliance with Section 9(h) was supported, petitioner asked Green, a fellow-Communist, whether Lenin's teaching that Communists in trade unions should use "artifice or device" to retain their posts was applicable to the present situation (R. 132). Green replied in the affirmative, adding that labor leaders could circumvent the law by joining "a Thursday afternoon social club" (R. 133).

So far as material, the testimony of Gardner and Mason related to statements which petitioner made in conversations with them individually, two with Gardner and six with Mason. As the prosecution conceded and the court below acknowledged, none of these conversations yielded direct evidence of membership or affiliation. The court below held, however, that they contained admissions by petitioner sufficient to support an inference that he was a member of and affiliated with the Communist Party when he signed the affidavits in 1951 and 1952. Three of the conversations occurred prior to the filing of the 1951 affidavit and the others thereafter. In what follows, we summarize the eight conversations in chronological order.

1. Mason[5] testified that in June, 1949, petitioner told him that the Executive Board of Mine, Mill would soon be acting on its policy of non-compliance with the filing requirements of Taft-Hartley because the union had been losing ground by not appearing on ballots in Labor Board elections and that there had been "discussions going on within the Party on this whole deal'" (R. 611).

2. Mason also testified to a conversation with petitioner in July, 1949, at the time when Mine, Mill decided to comply with the Taft-Hartley filing requirements. On that occasion, Travis said that he would have to resign from the Party. He gave Mason a copy of the statement announcing

[5] Mason was a member of the Executive Board of Mine, Mill during the period covered by his testimony (R. 602).

his resignation which, he said, "had been cleared with Ben Gold and the Party people in New York". He further told Mason that "the Party thinks this is the best policy for us in the unions to follow" (R. 612-13).

3. Gardner testified that he had a talk with petitioner in September or October, 1951 (several months prior to the date of petitioner's 1951 affidavit) when the two met for the first time.[6] Travis expressed gratification at the fact that the Cleveland Communist Party had recommended Gardner highly to Mine, Mill (R. 589). Travis also said that his public resignation from the Party had been a mistake because "it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits" (R. 590).

4. Mason testified that in March, 1952, petitioner told him that the Soviet delegates to the World Federation of Trade Unions were demanding that the "left-wing unions" in this country form a third federation of labor and that after discussion, "the boys in the other unions" had asked him, petitioner, to inform the WFTU that they were opposed to such a move. Petitioner added that the Party had left a decision in the matter "up to us and the unions" (R. 616).

5. Mason testified that in March, 1953, petitioner remarked to him that issues like the repeal of the McCarran Act were important because, "When they get us Communists they will be after people like you if we don't get these laws repealed" (R. 620).

6. Gardner testified that in June, 1953, while he was on his way to a new assignment in Idaho, Travis told him

[6] Gardner had just been employed by Mine, Mill as an international representative (R. 583).

in Denver that because of a factional dispute within the Communist Party in Idaho, in which Mine, Mill people were involved, Gardner should abstain from Communist Party activity for the time being. Travis added that he would arrange to have Gardner contacted by a Communist Party representative when the factional dispute was resolved, at which time Gardner could resume his Party activities (R. 593-94).

7. Mason testified that, in a series of conversations in July and August, 1953 (R. 623-33)[7] he complained to petitioner of the activities of "the Party watchdogs" in the union (R. 623), the policies of the union newspaper, and activities of the Party people in the union generally. Petitioner's attitude was that these complaints were "in direct opposition to the Party" and that the policies would not be changed (R. 632). When Mason threatened to conduct a fight against Communist control of the union, Travis replied that the left-wing group in the leadership was opposed to any compromises and added that he was "one of those in the Party who thinks there have been too many compromises already * * * that the Soviet Union is becoming stronger, and that the position of the Communists in the Union has been stronger" (R. 632). Travis concluded the conversation by saying, "You and Joe [Mason's brother] were invited to get into the Party, and had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so" (R. 633).

As we later show, *infra*, p. 11, the conviction cannot be supported on this evidence because (a) it does not satisfy the perjury rule which is applicable to this prosecution; (b) it consists entirely of uncorroborated admissions subsequent to the alleged commission of the crime charged;

[7] Initiated by a telephone call from Mason in Butte to Travis in Denver, which was followed by a meeting of the two men in Butte and then one in Denver. Since all three discussions dealt with the same subject, we treat them together.

and (c) it is insufficient even if the perjury rule and the rule barring conviction on uncorroborated admissions are inapplicable.[8]

The lack of evidence as to materiality.

There was no evidence that Mine, Mill filed any charge with the National Labor Relations Board, petitioned it to conduct any election, or otherwise participated in the Board's proceedings in any way not open to it if it had not complied, during the two annual periods following the filing of petitioner's 1951 and 1952 affidavits. Hence, there was a failure of proof that the alleged false statements were material, *infra*, p. 18.

The application of 18 U. S. C. 3500 and the refusal of the trial court to order the production of grand jury testimony of the prosecution witnesses.

On the trial, issues also arose under Section 3500. These are discussed *infra*, p. 30.

The trial judge refused, on motions of the defense, to direct that grand jury testimony of the prosecution witnesses about petitioner be produced for the defense or, in the alternative, for his inspection. The issues which are presented in this connection are discussed *infra*, p. 26.

The instructions.

The trial court instructed the jury that membership in the Communist Party " * * * connotes a status or mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member" (R. 1228).

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[8] Errors of the trial court in admitting Eckert's testimony of the "can't resign" policy of the Communist Party and in restricting the cross-examination of all three witnesses are discussed *infra*, p. 33.

Whatever guidance this definition, standing alone, might have given the jury was vitiated by the instructions that followed. In these, the jury was first told that "individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party * * * are circumstances which you may take into consideration along with all the other evidence in this case" in determining the issue of membership (R. 1228). The court then charged that in passing on this issue, the jury might consider eleven of the thirteen indicia of membership in the Communist Party set forth in the Communist Control Act of 1954, 50 U. S. C. 844.[9] These include consideration of such matters as whether the defendant had (a) "communicated * * * plans of the Communist Party," (b) "imparted information, suggestions, recommendations" to anyone "in behalf of the organization" or (c) "indicated * * * a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization" (R. 1229).

These instructions, in their totality, laid down hopelessly vague and irrational standards of proof and obliterated any distinction between "membership" and "affiliation" which, as the the trial court charged, "means a relationship short of and less than membership." (R. 1230).

Furthermore, the court refused to charge on the applicability of the perjury rule of evidence and to charge that the jury could not return a verdict of guilty unless it found that at the times the affidavits were filed the defendant believed himself to be a member of or affiliated with the Communist Party, *infra*, pp 11, 23, 25.

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[9] The two omitted indicia were whether the defendant (1) "has been listed to his knowledge as a member in any * * * document of the organization," and (2) "has made financial contributions to the organization in dues, assessments, loans, or in any other form."

The conviction and sentence.

Petitioner was convicted on all four counts of the indictment and was sentenced to a four year prison term on each count, the terms on the two membership counts to run consecutively, and the terms on the two affiliation counts to run consecutively with each other but concurrently with the terms on the membership counts. Petitioner was also fined $2,000 on each of the two membership counts.

The opinions below.

A majority of the court below rejected all of petitioner's contentions and affirmed the conviction. Judge Murrah, dissenting, App. A, *infra*, p. 76, held that the perjury rule was applicable and not satisfied by the evidence which, in any event, he found to be "inconclusive". He further held that a reversal was required "for the refusal of the trial judge to examine the grand jury evidence *in camera*, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice".

REASONS FOR GRANTING THE WRIT

I. Questions relating to the sufficiency of the evidence.

A. The perjury rule of evidence was applicable and was not satisfied by the proof.

This Court has never decided whether the perjury rule of evidence is applicable to proof of the crime of false swearing when prosecuted under Section 1001 rather than under the perjury statute, 18 U. S. C. 1621.[10]

[10] The question was before the Court in *Gold* v. *United States*, 352 U. S. 985, but was left undecided because of the reversal on another ground. Mr. Justice Clark, dissenting, protested against the Court's failure to decide this question, among others, at 986.

The perjury rule requires the direct evidence of at least two witnesses or "one witness corroborated by circumstances, proved by independent testimony". *United States* v. *Wood*, 14 Pet. 430, 440. This Court has consistently adhered to this rule. *Hammer* v. *United States*, 271 U. S. 620, 626; *Weiler* v. *United States*, 323 U. S. 606.

In support of his motion for judgment of acquittal, petitioner argued that the perjury rule was applicable, but the trial court ruled to the contrary (R. 1093-94, 1114).[11] The court below, with Judge Murrah dissenting, adhered to its decision in *Sells* v. *United States*, 262 F. 2d 815, cert. denied, 360 U. S. 913, that the perjury rule is inapplicable to a prosecution like this.

If the perjury rule is applicable, a reversal is required since, as the court below acknowledged, "The government's case is concededly circumstantial" App. A, *infra*, p. 55.[12]

False swearing under Section 1001 is in every respect but name the same as perjury under Section 1621. Hence, there is no reason why the rule for proving the latter should not be applicable to the former. Indeed, the filing of a false affidavit under Section 9(h) would have been punishable as perjury if the Section had not expressly stated that the crime should be prosecuted under Section 1001. And as Judge Murrah points out, "there is nothing in the legislative history of Section 9(h) to indicate that the Congress entertained the view that the perjury rule was inapplicable to prosecutions under Section 1001, as in Section 1621". App. A, *infra*, p. 76. That even judges equate a prosecution under Section 1001 for false swearing with perjury is shown by the opinions of Justices Frankfurter

[11] The issue was also raised in connection with the instructions to the jury, *infra*, p. 25.

[12] Judge Murrah's dissent characterizes the evidence as "indirect and circumstantial" and also "inconclusive". App. A, *infra*, p. 76.

and Jackson in *American Communications Association* v. *Douds*, where they referred to falsification of the non-Communist affidavit as "perjury". 339 U. S. 382, 420, 436.

In the *Sells* case, the court below had expressed the view that to apply the perjury rule would "merely thwart the attainment of the end which Congress sought to accomplish by the enactment of Paragraph 9(h)". 262 F. 2d 815, 822. This is not an argument for the inapplicability of the perjury rule to Section 1001 cases, but for its abolition altogether. This Court, however, rejected the same argument—i.e., that the perjury rule raises "an unjustifiable barrier to convictions"—when advanced by the government in a perjury case. *Weiler* v. *United States*, *supra*, at 608-09.

Furthermore, insofar as the opinion in the *Sells* case says that direct proof of Party membership "is requirement of the impossible", 262 F. 2d 815, 822, it contradicts what this Court said in *Douds* about the necessity of direct proof where the charge is that membership has been falsely denied in the 9(h) affidavit. 339 U. S. 382, 410-11. That, in this respect, *Douds* enunciated principles applicable to perjury prosecutions for denial of Communist Party membership was expressly recognized in such a case by the Court of Appeals for the Second Circuit. *United States* v. *Remington*, 191 F. 2d 246, 249.

The perjury rule has been applied in cases other than perjury where false swearing is the gravamen of the offense. Thus, *Hammer* v. *United States*, 271 U. S. 620, 629, holds the rule applicable to subornation of perjury, as well as to perjury, because "Falsity is as essential in one as in the other". Since falsity is likewise essential in this case, the perjury rule should be applicable here as well.

The decision below is in accord with *United States* v. *Killian*, 246 F. 2d 77 (C. A. 7), rev'd on rehearing, on other grounds, 246 F. 2d 82, and *Fisher* v. *United States*,

231 F. 2d 99 (C. A. 9), rev'd on other grounds.[13] But Judge Murrah in this case and Judge Bazelon in the *Gold* case, 237 F. 2d 764, 765-67, have expressed a contrary view, and in the *Fisher* case, the Court acknowledged that the question is "a close one", at 106. The question is important, relating as it does not only to cases of false 9(h) affidavits, but to all cases under Section 1001 involving false swearing. This Court should settle it.

B. The rule against convicting on the basis of uncorroborated admissions was violated.

A conviction may not be based on uncorroborated extrajudicial admissions of the accused made after the alleged commission of the offense. For such admissions, like confessions, are too untrustworthy by themselves to warrant a finding of guilt. *Opper* v. *United States,* 348 U. S. 84. Cf. *Warzower* v. *United States,* 312 U. S. 342, 347-48. The *Opper* case involved statements of the accused to the FBI, but the decision was not limited to admissions made to governmental authorities. The Court stated, at 89-90, that "the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under suspicion may tinge or warp the facts of the confession" just as much as "the zeal of the agencies of prosecution".

The conviction of petitioner violates the rule enunciated in *Opper.* As we have seen, *supra,* pp. 7-8, Gardner and Mason testified to five conversations which one or the other of them had with petitioner after the execution of the 1951 affidavit. We later show that petitioner's statements in these conversations were entirely consistent with innocence.

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[13] In *Gold* v. *United States,* 237 F. 2d 764, rev'd on other grounds, 352 U. S. 985, where this was an issue, the conviction was affirmed by an equally divided *en banc* court. Judge Bazelon was the only judge who filed a statement of his reasons.

But even if they had contained admissions that he was a member of or affiliated with the Communist Party when the affidavits were executed, the admissions would be insufficient unless corroborated.

There was no corroboration. First, there was no evidence whatsoever of any other occurrences subsequent to the filing of the 1951 affidavit which could give rise to an inference of membership or affiliation on or after that time. Second, there was nothing in the evidence of events prior to the execution of the 1951 affidavit which corroborates the post-affidavit admissions. The June, 1949, conversation between Mason and petitioner, *supra*, p. 6, shows only that petitioner said that discussions about compliance were going on within the Party. Petitioner's July, 1949, statement to Mason, *supra*, pp. 6-7, that the announcement of his resignation had been approved by the Party as "the best policy for us in the unions to follow" is obviously no evidence that his resignation was spurious. And his comment to Gardner in the fall of 1951, *supra*, p. 7, that he believed *public* resignation a mistake because it gave "the enemies of the Party" an opportunity to charge that "his wasn't a true resignation" is not an admission of continuing membership but a statement of what his opponents were asserting.

Eckert's testimony that it was Party policy not to recognize resignations, *supra*, p. 5, if admissible, does not aid the prosecution. There is no evidence that petitioner had knowledge of this supposed policy and, as the court below acknowledged, App. A, *infra*, p. 58; "without more, it could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed". Plainly, therefore, this testimony does not corroborate the post-affidavit admissions which relate to petitioner's "state of mind", *i.e.*, his alleged lack of good faith in resigning from the Party.

Likewise unavailing is Eckert's story that in 1948 petitioner asked Green about the applicability of Lenin's dictum that Communists in trade unions should resort to "artifice" to retain their posts, *supra*, pp. 5-6. In the first place, the question was purely hypothetical since Communist Party policy and petitioner's own position at the time was one of non-compliance with Section 9(h). Moreover, there is no evidence that petitioner acquiesced in Green's affirmative answer to his question. At most, this conversation indicates that in 1948 petitioner had an inconclusive discussion of the possible use of "artifice" as an abstract tactical question. The fact that he did so does nothing to corroborate claimed admissions of Party membership made four years later.

Since petitioner's post-affidavit admissions were uncorroborated and there was no other post-affidavit evidence on which a finding of guilt could be made, the trial court erred in submitting the case to the jury. The admissions were not even direct, but circumstantial.

In sustaining the conviction without reference to the rule of the *Opper* case, the court below decided an important question of criminal evidence contrary to the decisions of this Court.

C. The evidence was insufficient without reference to the perjury rule or the rule against convicting on uncorroborated admissions.

In the preceding point we examined all of the evidence relating to the period prior to the execution of the 1951 affidavit and showed that it contains nothing from which guilt can be inferred. It remains to consider petitioner's five post-affidavit conversations with Gardner and Mason, on the assumption that neither the perjury rule nor the rule against convicting on uncorroborated admissions is applicable to proof of petitioner's guilt.

Our summary of the five conversations, *supra*, pp. 7-8, confirms Judge Murrah's observation that the evidence against petitioner was "inconclusive". App. A, *infra*, p. 76. The only admissions which are damaging in any sense were made in petitioner's March and August, 1953 talks with Mason. In March, petitioner warned Mason that unless the McCarran Act [14] and similar legislation was repealed, "When they get us Communists they will be after people like you". In August, petitioner told Mason that his group in Mine, Mill was opposed to any compromise with Mason's faction and added that he was "one of those in the Party who thinks there have been too many compromises already". Both statements are equivocal at best. Petitioner's reference to himself as a "Communist" in the March statement may well have meant no more than that, as an acknowledged former member of the Party and a trade union leader who had not renounced his radical views, he would be among the first targets of current anti-Communist legislation. And the August statement is oper to interpretation as an admission merely of membership in the so-called "Party" faction in Mine, Mill rather than in the Communist Party itself. Obviously, a conviction cannot rest on two such slender reeds.

Petitioner's other statements in the post-affidavit conversations show that at most he was a member of the Mine, Mill leadership which may have been in sympathy with Communist trade union policy,[15] and that he had respect for the Communist Party, and was in occasional contact with it.

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[14] Apparently a reference to the Internal Security Act of 1950, 50 U. S. C. 781.

[15] However, the grouping did not always support Communist policy. Thus, it appears from one of these conversations that petitioner and other trade unionists rejected a demand by the Soviet delegation to the Word Federation of Trade Unions that the "left wing" unions in this country organize a third labor federation, *supra*, p. 7.

This is not proof of membership. It is entirely lacking in the element of mutuality which lies at the heart of the membership relation and which the trial court defined as "the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him a member" (R. 1228).[16] And cf. *Bridges* v. *United States*, 199 F. 2d 811 (C. A. 9), rev'd on other grounds, 346 U. S. 209, holding that attendance at numerous Communist Party meetings, including "closed" meetings, acceptance of the Party's aid and assistance, sympathy with Party objectives, and the expression of opinions on national and world affairs that coincide with the Party's position are insufficient to prove membership.

The post-affidavit evidence is equally deficient as proof of affiliation. For there was no showing of a course of conduct by petitioner which, in the words of the trial court's instructions (R. 1230), established "a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis."[17]

The nature of the evidence required to prove membership in or affiliation with the Communist Party has not been decided by this Court. The question is one of importance in criminal prosecutions and other proceedings where such membership or affiliation is in issue.

D. The evidence of materiality was insufficient.

Each of the counts in the indictment alleges that the false statements were material and the trial court cor-

[16] Taken from Mr. Justice Burton's concurring opinion in *Jencks* v. *United States*, 353 U. S. 657, 679.

[17] Also from Mr. Justice Burton's concurrence in *Jencks*, *supra*, at 679-80.

rectly charged the jury that materiality was one of the essential elements of the offense (R. 1225). But there was in fact no evidence of materiality.

On the trial, the parties stipulated that the affidavits and the other documents required by Sections 9 (f), (g), and (h) of Taft-Hartley had been filed with the Labor Board in 1951 and 1952 and that, on both occasions, the Board had notified Mine, Mill that it was in compliance with the filing requirements (R. 42-50). However, there was no evidence in the case that Mine, Mill had actually utilized the processes of the Board in ways that would not have been available to it if it had not complied.[18] In denying the motion for a judgment of acquittal, the trial court ruled that such evidence was not necessary (R. 1107).

The trial court was in error. The purpose in filing the affidavits (and the other necessary documents under Sections 9 (f) and (g)) with the Labor Board is not to be notified by the Board that there is "compliance", but to use the machinery of the Board. Section 9 (h) does not refer to "compliance", but to the actual use of the Labor Board's procedures.[19] Without evidence of any such use, the false statements in this case had no materiality.

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[18] That is, by filing charges, appearing on the ballot in representation elections, etc.

[19] In *Jencks*, 353 U. S. 657, and in *Gold*, 352 U. S. 985, the prosecution recognized this by presenting evidence that the respective labor organizations had in fact so used the Board (R. 1095).

II. Questions relating to the instructions.

A. The instructions on "membership" and "affiliation" were erroneous.

The trial court first charged that membership in the Communist Party, "the same as membership in any other organization" requires the presence of "the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member" (R. 1228). While the court then charged that the question of petitioner's membership was to be decided from all the evidence in the case, the only specific evidentiary standards to which it directed the attention of the jury were all of the 13 indicia of membership set forth in Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844.

The Court has not had previous occasion to consider Section 5 which, on its face and as applied below, raises questions of far-reaching importance under the First and Fifth Amendments.[20]

Section 5 provides that "in determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented" as to the 13 indicia which the Section then enumerates. This introductory provision, alone, demonstrates the invalidity of the Section.

First, the rule of evidence which the Section enunciates is made applicable only to proof of membership in the Communist Party and organizations that seek the violent overthrow of the Government. There is no rational basis

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[20] The grant of certiorari in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 included review of the constitutionality of the Section, but the Court did not reach the question.

for this classification. Moreover, the classification contradicts the trial court's instruction that membership in the Communist Party is the same as membership in any other organization.

Second, the quoted provision makes evidence as to one or more of the 13 indicia that follow admissible to prove, indiscriminately, (1) membership, (2) participation, and (3) knowledge of the organization's purpose. But participation may exist without membership; knowledge of purpose may exist without membership or participation, and membership or participation may exist without knowledge of purpose. It is apparent that a system of proof which equates these three distinct concepts must either be irrational, hopelessly vague, or both.

Turning to the indicia themselves, it appears, in the first place, that none of them is limited as to time. Thus, any activity of the sort which they describe may serve as evidence of present membership notwithstanding that it ceased in the remote past. Such a rule of evidence is patently irrational. Its irrationality was carried over into the instructions. For they left the jury free to consider conduct by petitioner of the kind described in the indicia during his conceded membership in the Communist Party (as early as 1942) as evidence of membership in 1951 and 1952, the times charged in the indictment.

The first two indicia of Section 5 bear an obvious relation to proof of membership: (1) the listing of the accused, to his knowledge, as a member in the records of the organization; and (2) payment by the accused of dues or assessments. But these were the only ones of the 13 indicia not included in the charge, obviously because there was no evidence of either. In consequence, petitioner was deprived of the benefit of a negative finding on these indicia, even though the introductory clause to the Section requires that all the indicia be given to the jury.

The remaining 11 indicia have no rational relation to proof of membership either as the term is commonly under-

stood or as the charge defined it. This is apparent from inspection. We confine ourselves to four examples.

Paragraph (6) permits membership to be inferred from the fact that the accused has conferred with officers or members "in behalf of any plan or enterprise of the organization." Thus, any person who consults or advises with a member or officer of the Communist Party with respect to any of its "plans", however praiseworthy, thereby furnishes evidence of his membership in the organization.

Other paragraphs go even further by eliminating contact or communication between the accused and the organization as a requisite to evidence of membership. Thus, paragraphs (11), (12) and (13) provide that a jury may infer membership from the fact that the accused has imparted information, suggestions or recommendations to anyone "in behalf of the objectives of the organization", has indicated in any way "a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization", or "has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization." Under these paragraphs, an accused who has expressed a view or taken a position on any public question which corresponds to that of the Communist Party thereby furnishes evidence of party membership.

Considered individually or collectively, the 11 Section 5 indicia of membership contained in the instructions permit a finding that almost anyone is a member of the Communist Party. Moreover, no one can possibly know, in advance of the jury's verdict, whether or not his activities make him a member.[21] The lack of any rational relation

[21] The vices inherent in Section 5 were compounded by the further instruction that, while not conclusive, the jury could consider "individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party" in determining the question of membership (R. 1228).

between these evidentiary criteria and the fact to be proved, and their extravagant vagueness—particularly since they involve rights of speech and assembly—condemn them as violative of due process. *Tot* v. *United States*, 319 U. S. 463, 467; *Bailey* v. *Alabama*, 219 U. S. 219, 235; *Manley* v. *Georgia*, 279 U. S. 1; *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Furthermore, because Section 5 leaves the jury free to find membership from evidence that the accused engaged in constitutionally protected speech, it also violates the First Amendment. *Winters* v. *New York*, *supra*.

The court below, in an apparent reference to the trial judge's initial definition of "membership", stated, App. A, *infra*, p. 69:

> "* * * it must be presumed that the jury, after such careful instructions on the components of membership, is perfectly capable of separating evidence which tends to prove membership from evidence which does not."

This presumption might have been legitimate if the Section 5 indicia had been omitted from the charge. Their inclusion, however, raises the contrary presumption since the jury was thereby specifically instructed to consider evidence which had no conceivable tendency to prove membership as defined by the trial court.

The resulting prejudice to petitioner was accentuated by the refusal to charge that he could not be convicted unless the jury found that he believed himself to be a member when he executed the affidavits (Supp. R. 8). Thus, the jury, having found petitioner to be a member on the basis of the vague and irrational indicia of Section 5, was left free to convict without making the further finding that petitioner considered himself a member or, at least,

the jury could not reasonably have done otherwise.[22] Cf. *American Communications Association* v. *Douds*, 339 U. S. 382 at 413; *Screws* v. *United States*, 325 U. S. 91. The refusal of this instruction was peculiarly harmful because the Communist Control Act was not enacted until 1954. Hence, petitioner could not have known when he executed the affidavits in 1951 and 1952 that their truth or falsity would be judged by the evidentiary standards of Section 5. For this reason also, Section 5, even if valid on its face, violates the *ex post facto* clause of the Constitution as applied to petitioner.

The conviction cannot be sustained on the theory that because petitioner's sentences on the membership and affiliation counts run concurrently, any error in the instructions on membership were harmless. For the vice of the latter infected the instructions on affiliation.

The trial court charged that "affiliation" means "a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party." (R. 1230). As we have seen, however, the court's instructions under Section 5 of the Communist Control Act permitted the jury to base a finding of membership on evidence of activities of petitioner that established no more than his sympathy with the legitimate aims and objectives of the Party. The jury must, therefore, have believed that it was entitled to find affiliation, a "relationship short of and less than membership," from the same evidence.

Accordingly, the instructions on membership vitiated the court's definition of affiliation as "a close working alliance or association between [petitioner] and the organi-

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[22] The generalized instruction earlier in the charge (R. 1228) that petitioner could not be found guilty unless he knew that the affidavits were false is obviously no substitute for the instruction that was requested.

zation, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period on a fairly permanent basis." (R. 1230). For, once the jury found that petitioner was a member of the Communist Party under the Section 5 indicia, it could and undoubtedly did proceed to find him an affiliate on the basis of the elementary proposition of logic that the greater includes the lesser.

Hence, the inclusion of the Section 5 indicia in the instructions on membership permitted the jury to find affiliation as well as membership from evidence that was not probative of either relationship. Moreover, the instructions on affiliation, like those on membership, were prejudicial because of the refusal to charge that petitioner could not be convicted unless he believed himself to be an affiliate at the time he executed the affidavits (Supp. R. 5).

The questions presented by Section 5 of the Communist Control Act and the instructions on membership and affiliation are novel and important, and were decided below contrary to the applicable decisions of this Court. They should therefore be reviewed.

B. The refusal to instruct on the perjury rule was erroneous.

We have urged, *supra*, p. 11, that the trial court should have granted the motion for an acquittal because the proof failed to satisfy the perjury rule of evidence. If the rule is applicable, the court should, at least, have given the requested instruction (Supp. R. 5-6) on the subject.

III. Questions relating to the production of Grand Jury testimony of the prosecution witnesses for the purpose of impeachment.

In three respects, the decision below violates the principles enunciated by the Court in *Pittsburgh Plate Glass Co.* v. *United States* and *Galax Mirror Company* v. *United States,* 360 U. S. 395. In addition, the case presents the question that the Court expressly reserved, at 401, *i.e.*, whether the trial judge, upon request, is "absolutely required" to examine the grand jury testimony of a prosecution witness for inconsistencies with his trial testimony.

Eckert and Mason, two of the three government witnesses, had testified in 1954 before the grand jury which indicted petitioner in this case and again in 1956 before a grand jury in the same district which indicted petitioner and 13 others for conspiracy to file false affidavits under Section 9 (h). *United States* v. *Pezzati et al.*, awaiting trial (Crim. No. 15124). Gardner, the third government witness, had testified before the grand jury in the *Pezzati* case.

On the trial, after each of the three witnesses had completed his direct testimony, the defense moved that his testimony about petitioner before the grand juries be produced directly to the defense, or, in the alternative, to the trial judge for his inspection and then to the defense if the inspection disclosed any contradictions or inconsistencies with the trial testimony. The motions were denied when made and again when renewed after the cross-examination of each witness had otherwise been completed: (*Eckert*: R. 197, 212-20, 551-73. *Gardner*: R. 598-99, 699-701, 864-67. *Mason*: R. 635, 988-90.) When the defense asked the witnesses whether they had testified before the grand juries about the episodes to which they had testified on direct examination and even whether they had testified about petitioner before the grand juries at all, the trial

judge sustained the objections of the government (R. 540, 698-701, 704, 873-74). Yet, he also ruled that unless the defense first showed a contradiction between the trial testimony and the grand jury testimony, the grand jury testimony need not be produced (R. 219, 573, 867).

1. The *Pittsburgh Plate Glass* case, at 400, requires that the trial judge exercise his discretion to determine whether the accused has shown "a particularized need" which justifies production of the grand jury testimony directly to the defense. The trial judge failed to exercise this discretion. Instead, he required the defense to show a contradiction between the grand jury and the trial testimony. But *Pittsburgh Plate Glass*, 400-01, declares that such a showing is unnecessary. Moreover, the trial judge made the showing impossible by barring interrogation of the witnesses about the substance of their grand jury testimony.

2. The defense *did* demonstrate "a particularized need". (*Eckert*: R. 551-73; *Gardner*: R. 864-67; *Mason*: R. 988-90.) All three of the witnesses were ex-Communists and Mason had been an informant for the FBI at the time that he was a member of the Executive Board of Mine, Mill. Eckert and Gardner had been associated with Mine, Mill, and were officials of rival labor organizations at the time they testified. The testimony of all three witnesses betrayed their hostility towards petitioner and towards Mine, Mill and there are inconsistencies in the testimony of each. This was the eighth time since 1950 that Eckert had testified publicly against Mine, Mill and petitioner (R. 248-51), but his testimony, for example, as to who in addition to himself and petitioner had attended particular meetings, had not been consistent in any two of the proceedings (R. 399-448, 536-51). Mason had admittedly been mistaken in his testimony on a prior occasion about the city where he had had his July, 1949 conversation with petitioner (R. 894-95, 988-

89)[23] and, on direct examination, gave detailed testimony about his conversations with petitioner during the period from 1949 to 1953 despite an admission to the FBI in June, 1955 that he was "unable to enlarge" on information about petitioner "as to dates, places or specific individuals or incidents" (R. 989).

Although Gardner had given the FBI information from time to time since 1955, statements of his produced under Section 3500 contained no reference whatever to the two conversations with petitioner which comprised all of his material testimony and, on cross-examination, he conceded that he had never told the FBI about the two episodes (R. 864-66). His testimony cast serious doubt on his credibility generally (see, e.g., R. 656, 662-64, 667-68, 714-30). Even though the defense restricted its request to Gardner's grand jury testimony, if any,[24] about the two conversations, the request was denied (R. 864-67).

In Gardner's case particularly, it is difficult to see what more the defense could have done to show "a particularized need", especially since the trial court would not permit him to be cross-examined about his grand jury testimony.

3. Even if the foundation was insufficient to justify direct production of the grand jury testimony to the defense, and assuming that the trial judge is not "absolutely required" to inspect the minutes, the foundation in the case of each witness was certainly strong enough to require the trial judge to make the inspection himself to determine whether the "ends of justice" required disclosure. *Pittsburgh Plate Glass*, 360 U. S. at 400. Judge Murrah's dissent so holds. App. A, *infra*, pp. 76-77.

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[23] *Supra*, pp. 6-7.

[24] Cf. *Jencks*, 353 U. S. 657, 667, on the relevance "to the cross-examining process" of showing that the witness did not tell his story on a prior occasion when it would have been natural for him to do so.

4. We turn now to the question which was reserved in the *Pittsburgh Plate Glass* case, that is, whether the trial court is, in any event, "absolutely required" to inspect the grand jury testimony for inconsistencies. We believe that the affirmative answer given by the Court of Appeals for the Second Circuit is correct. *United States* v. *Spangelet*, 258 F. 2d 338.

The basis for the refusal of this Court in *Pittsburgh Plate Glass* to approve automatic delivery of grand jury minutes to the defense is the policy of secrecy. But secrecy is academic when there is preliminary inspection by the trial court. After such inspection, the defense gets only what it is entitled to, if anything—such of the witness' grand jury testimony as the trial judge finds is inconsistent with his trial testimony. All the considerations advanced in the dissenting opinion in the *Pittsburgh Plate Glass* case (except, of course, those bearing on the desirability of direct production as against inspection by the trial court) apply with even greater force to this branch of the problem. Since the government is free to use grand jury minutes "to further its own interests in litigation", 360 U. S. at 404, fairness entitles the accused, at a minimum, to have the trial court inspect them in all cases.[25]

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[25] In fact, in the *Spangelet* case, 258 F. 2d 338, where the appellant argued that the trial judge should have ordered direct production of the minutes instead of inspecting them himself, the government argued in its brief (p. 20) that the trial judge "wisely concluded" that his resolution of the problem struck a balance between the policy of secrecy, on the one hand, and the rights of the accused, on the other. From the dissenting opinion in *Pittsburgh Plate Glass*, it appears that in that case, the government took the same attitude as in the *Spangelet* case. 360 U. S. 395, 408-09.

However, a reference in *United States* v. *Stromberg*, 268 F. 2d 256, a recent decision of the Court of Appeals for the Second Circuit, seems to indicate that in some, if not in all criminal cases in the Southern District, the prosecution now makes the grand jury testimony of its witnesses automatically available to the defense. In connection with its discussion of the testimony of Ewing, a government witness, the Court noted that after his direct examination, the prosecution delivered to the defense Ewing's grand jury testimony as well as his statements under Section 3500. 268 F. 2d 256, 273, n. 16.

This Court should now settle this question, as well as the others this case raises in connection with the production, on trial, of grand jury testimony.

IV. Questions relating to the application of Section 3500.

A. In *Palermo*, 360 U. S. 343, the Court said, at 354:

> "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production of a particular statement is compelled by the statute we approve the practice of having the Government submit the statements to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

On the trial in this case, however, when this question was presented—that is, when it is doubtful if "a particular statement comes within the terms of (e)", whether the prosecution or the court resolves the doubt—the trial judge ruled that this is a determination to be made not by him, but by the prosecution (R. 232-36; 636-45). The ruling flatly contradicts *Palermo*.

B. The trial judge also pursued an improper course when the prosecution contended that Congressional investigators and government attorneys are not agents of the government within the meaning of subsection (a) of Sec-

tion 3500 (R. 201, 208-09).[26] The court expressly refused to decide that issue (R. 527), but instead, required the defense to lay a foundation by cross-examining the three witnesses in chambers to determine whether they had in fact made statements, as defined in subsection (e), to Congressional investigators or government attorneys. After such cross-examination (*Eckert*: R. 364-98, 453-71, 508-21; *Gardner*: R. 785-844; *Mason*: R. 956-86), the court denied the motion for the production of statements about petitioner which Eckert had made to a Senate investigator (R. 315-20, 364-67) and all three witnesses had made to government attorneys (R. 383-98, 453-71, 508-20, 811-12, 833-44, 956-66, 983-85) because the defense had not shown that there were "statements" as defined in subsection (e) (R. 200, 208-09, 380-83, 523-27, 845-47, 986-88).

The opinion of the court below correctly proceeds on the unspoken premise that "statements" to the Senate investigator and to the government attorneys are producible, but says that "there is nothing in the record to indicate" that the witnesses had made "statements" to such persons. App. B, *infra*, p. 73. The court thus approves the procedure whereby the trial judge placed on the defense the well-nigh impossible burden of showing that there were "statements" made to such agents. But *Palermo* declares that no such foundation is necessary. If there are "statements" in the possession of the government, Section 3500 requires that they be produced. There is no more reason for the defense to have the task of showing that there are "statements" when they were made to Congressional investigators and government attorneys than in the cases when they were made to FBI or tax agents, for example. The trial judge should have ruled that Congressional

[26] The government did not make such an argument in *Lev* v. *United States*, 360 U. S. 470, which involved a Senate investigator, or in *Rosenberg* v. *United States*, 360 U. S. 367, which involved an Assistant United States Attorney.

investigators and government attorneys are agents as defined in subsection (a) and should then have required the government to produce "statements" made to them by the witnesses.

C. The two rulings of the trial court, if correct, would give rise to questions under the *ex post facto* and due process clauses because the rulings deprived petitioner of access to relevant statements of the witnesses, in the one case because the prosecution and not the court decided whether doubtful statements met the requirements of (e), and in the other, because the court did not require the prosecution to produce whatever statements it had that the witnesses had made to the Senate investigator and to government attorneys.

Since petitioner was indicted in October, 1954, while Section 3500 became law on September 2, 1957 (71 Stat. 595), the application of Section 3500 to his case in a manner which thus operated to his "substantial disadvantage" violated the *ex post facto* prohibition. *Lindsey* v. *Washington*, 301 U. S. 397, 401-02. See also, *Calder* v. *Bull*, 3 Dall. 386, 390; *Putty* v. *United States*, 220 F. 2d 473, 476-78 (C. A. 9).

As applied in this case, Section 3500 also violates due process. Even on its face, subsection (e) is of doubtful constitutionality because the standards it requires of statements made to agents of the government, as distinguished from statements made to others, are arbitrary and have no reasonable relationship to the use of the statements for impeachment. This is "mere legislative fiat". *Manley* v. *Georgia*, 279 U. S. 1, 6.

In any event, to give the prosecutors the unreviewable power to withhold statements made by the witnesses when they, the prosecutors, are in doubt whether the statements meet the standards fixed by subsection (e) and the power to withhold statements made to Congressional investi-

gators and to attorneys for the government unless the defense can establish that there are such statements in existence, is to impose unreasonable and arbitrary restrictions on the right of cross-examination.

The power of Congress to regulate the rules of evidence in the federal courts is subject to due process. *Tot v. United States*, 319 U. S. 463; *Benton* v. *United States*, 232 F. 2d 341 (C. A. D. C.) Section 3500, as applied by the trial court, violates due process.

V. Questions relating to the admission and exclusion of evidence.

A. Eckert's "can't resign" testimony was improperly admitted.

Eckert was permitted to testify that during his membership in the Communist Party, which terminated in 1948, the policy of the Party was "that once having joined [it] you could not leave without being expelled." (R. 196). There was no evidence that petitioner had knowledge of any such policy or that the policy was in effect at the time of his resignation in 1949 or when he executed the affidavits in 1951 and 1952. However, the trial court refused to instruct the jury that it could not consider the Eckert testimony unless it found from other evidence that petitioner knew of the existence of the "can't resign" policy at the time of his resignation (Supp. R. 2). Finally, the existence of the supposed policy rests solely on Eckert's bald assertion, unsupported by any factual foundation.[27]

[27] The testimony is contrary to data which establish that there have been massive resignations from the Party throughout the period of its existence. See, e.g. J. Edgar Hoover, *Masters of Deceit*, p. 5; Chap. 9; Howe and Coser, *The American Communist Party*, pp. 528-29.

This testimony of Eckert's was plainly prejudicial and its admission was erroneous.

First, the testimony was irrelevant. The court below stated, App. A, *infra*, p. 58, that it "was probative of the second side of the question of membership, *i.e.* whether the Party was willing to accept the defendant and recognize him as a member." This statement misconceives the issue in the case which was whether petitioner *believed himself* to be a member at the time he signed the affidavits. Obviously, the "can't resign" policy is of no probative value on this issue since, so far as the evidence shows, petitioner was totally unaware of the existence of the policy. Although the court below acknowledged that the Eckert testimony "could show nothing of the state of mind of the defendant," it nevertheless held that "the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and behavior" App. A, *infra*, pp. 58, 60. But a fact of which petitioner was ignorant and which therefore can reveal nothing about his state of mind is, by the same token, of no possible help in interpreting his statements and behavior.[28]

Second, the testimony was incompetent. As the court below recognized, App. A, *infra*, p. 60, knowledge of the supposed policy cannot be imputed to petitioner from his membership in the Party. Accordingly, Eckert's testimony was rank hearsay.

Third, the evidence shows that if the no-resignation policy was ever in effect, it was abandoned prior to the date when petitioner resigned. For it appears from the testimony of the prosecution witness Mason that the Party

[28] Even Section 5 of the Communist Control Act does not make the fact that the Communist Party has listed the accused as a member relevant to prove membership unless the accused had knowledge of the listing.

had agreed to and endorsed petitioner's resignation as "the best policy for us in the unions to follow." *supra*, p. 7.

Fourth, the admission of Eckert's unsupported opinion on a critical issue of fact usurped the function of the jury. *United States* v. *Spaulding*, 293 U. S. 498, 506; *Simmons* v. *United States*, 206 F. 2d 427, 429-30 (C. A. D. C); *Wesson* v. *United States*, 164 F. 2d 50, 54-55 (C. A. 8).

Finally, as Judge Bazelon in *United States* v. *Gold*, 237 F. 2d 764, 772, rev'd on other grounds, 352 U. S. 985, points out concerning similar testimony by Eckert and others in that case:

> "Such general testimony is not direct evidence of what appellant did or did not do. If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with Section 9 (h), and the statutory phrase 'is not a member' is precisely equivalent to 'has never been a member'. This possibility *Douds* specifically rejects."

In other words, if petitioner could not resign from the Party, then 9(h) becomes a bill of attainder.

The question presented by the admission of Eckert's testimony is an important one which is likely to arise in other cases involving proof of continuing membership in the Communist Party and it should therefore be reviewed by the Court.

B. Cross-examination of the prosecution witnesses was improperly restricted.

On cross-examination, the trial court prevented the defense from trying to show that Mason, a naturalized citizen and an ex-Communist, became an informant for the FBI (R. 868-69) and testified against petitioner because he feared denaturalization and deportation (R. 934-41).

The trial court also ruled that the defense could not show, on cross-examination, that the labor organizations of which Eckert and Gardner were officials at the time they testified were rivals and competitors of Mine, Mill (*Eckert*: R. 481-83. *Gardner*: R. 735-38, 760-65, 815-18, 848).

In its opinion, the court below points out that although cross-examination is a matter of right, its scope may reasonably be limited by the trial judge. App. A, *infra*, p. 63. We agree. However, in this case, the limitations imposed were unreasonable and an abuse of discretion. Cross-examination with respect to legitimate matters bearing on the interest, bias, and prejudices of the witnesses was cut off entirely. Cf. *District of Columbia* v. *Clawans*, 300 U. S. 617, 632.

Mason—In the case of Mason, who had become a naturalized citizen in 1938 (R. 934-36), the defense attempted to show by cross-examination that the Immigration and Naturalization Service was investigating and had interrogated him in 1952 because Congress had provided in 1950 (in the Internal Security Act of 1950, 50 U. S. C. 781) for the deportation of aliens on the ground of past Communist Party membership; that Mason, aware of the change in the law, had become fearful that he might be denaturalized and deported and was seeking advice about the effect of the law on his status; and that, because of this fear, he had become an informant for the FBI and a witness against petitioner after his interrogation by the Immigration and Naturalization Service (R. 934-41).[29]

[29] As we have said, the Immigration Service interrogated Mason in 1952. In 1953, when he was still a Mine, Mill Executive Board member, we find him making confidential reports to the FBI about petitioner (R. 868-69). In 1954, he first testified publicly against petitioner and Mine, Mill in the Labor Board proceeding upon which this Court passed in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145 (R. 872-74). In 1955, he was a witness on petitioner's first trial on this indictment (R. 872).

The trial judge ruled that this line of cross-examination was improper unless the defense could show that the government had actually made a threat or a promise to Mason in connection with his status as a citizen (R. 939-41). The court below, on the other hand, upheld the trial judge not on that ground, but on the ground that the inference that Mason was coerced to testify against petitioner because of fear of denaturalization and deportation was rebutted by the fact that since he had disclosed his past Communist Party membership when he was naturalized in 1938, he could not have been denaturalized under the 1950 law. App. A, *infra*, p. 64. But the defense *is* entitled to show by cross-examination that the attitude and state of mind of a witness has been affected by threats or promises by the government or by the hope of reward or of more favorable treatment. *Alford* v. *United States*, 282 U. S. 687, 693-94; *Gordon* v. *United States*, 344 U. S. 414, 422-23; *Spaeth* v. *United States*, 232 F. 2d 776 (C. A. 6); *United States* v. *Hogan*, 232 F. 2d 905 (C. A. 3). And since the question relates to the actual state of mind of the witness and his motives for testifying, it is also proper to show a belief on the part of the witness that, if he testifies, he will receive some benefit or favorable treatment from the government, even if there is no rational basis for such a belief. *Farkas* v. *United States*, 2 F. 2d 644, 647 (C. A. 6). This was what the defense was trying to show in Mason's case. It was therefore immaterial that no threat or promise may have been made to him or that the government could not effect a change in his status as a citizen.

Eckert and Gardner—At the time he testified, Eckert was assistant director of the Die Casting Department of the United Automobile Workers (R. 42) and had been associated with that union since shortly after he left Mine, Mill in 1948 (R. 481). It was under his leadership that some local unions of Mine, Mill changed their affiliation at that time to the U.A.W. (R. 482). The trial judge did not permit the defense to show, by cross-examination, that the U.A.W.

had been Mine, Mill's principal competitor in the East since 1948 and that the two organizations had opposed each other in many Labor Board elections (R. 481-83).

At the time he testified, Gardner had been a consultant and conciliator for the International Hod Carriers, Building and Common Laborers Union of America since January, 1956, a few months after he had been discharged by Mine, Mill (R. 583, 735). After the defense had asked him several questions about the rivalry between the Hod Carriers Union and Mine, Mill without objection by the prosecution (R. 735-37), the trial court, *sua sponte*, stopped the line of questioning (R. 737) and instructed the jury to disregard the testimony the witness had already given on the subject (R. 848). In arguing on the trial for the propriety of this line of cross-examination of Gardner, the defense stated that it sought to develop that the Hod Carrier's Union was not just another rival of Mine, Mill's, but that it had sought to absorb Mine, Mill altogether, by merger or otherwise; that Gardner had been personally involved in such efforts; and that only a month earlier, the Hod Carriers Union had been one of the two unions which had voted against a successful resolution at the convention of the Metal Trades Council, AFL-CIO, that Mine, Mill be granted a charter by the AFL-CIO (R. 760-65, 815-18).

The court below held that since it is proper to restrict cross-examination on matters having "only a slight and indirect bearing on the bias and credibility of a witness", the trial court correctly ruled that the evidence petitioner thus sought to elicit from Eckert and Gardner "was too remote to be admissible". App. A, *infra*, p. 65.

To say that the rivalry between the unions has "a slight and indirect bearing" on the state of mind of Eckert and Gardner as witnesses is to deny the facts of life. It is generally recognized that the rivalries between labor organizations and between their leaders are as bitter and as passionate as any in our society. If George Meany

were to testify against James Hoffa in a criminal case, for example, it is hard to believe that the defense would not be permitted to show the existence of the dispute between the AFL-CIO and the Teamsters as bearing on Meany's state of mind.

The court below acknowledges that in civil cases, it is proper to show that the witness has an indirect interest in the dispute between the parties by virtue of his employment,[30] but distinguishes this as a criminal case, in which the employers of the witnesses had no interest. App. A, *infra*; p. 65. But such a distinction is artificial and unrealistic, since the bias of witnesses like Eckert and Gardner arising from the rivalry of the unions might be ever more lively in a criminal case against a Mine, Mill leader than, for example, in a suit for money between their respective organizations and Mine, Mill. In the competition for membership, a conviction of petitioner in a case like this would have much greater impact than a mere money judgment against Mine, Mill. In any event, it has been held in criminal cases that, for example, fraternal lodge affiliation (*Felice* v. *State*, 18 Okla. Cr. 313, 194 Pac. 251), enmity between families (*Ham* v. *State*, 21 Ala. App. 103; 105 S. 390), and even race and nationality (*People* v. *Krug*, 10 Cal. App. 2d 172, 51 P. 2d 445), have

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[30] Citing *Central Truck Lines* v. *Lott*, 249 F. 2d 722 (C. A. 5), where the witness tesified for his employer; *Majestic* v. *Louisville and N. R. Co.*, 147 F. 2d 621 (C. A. 6), where the employer of the witness had an interest in the recovery; *Lexington Glass Co.* v. *Zurich etc. Ins. Co.*, 271 S. W. 2d 909 (Ky. App.), where the witness was employed by the law firm representing the party for whom he testified; *Manley* v. *Northumberland County*, 32 F. Supp. 775 (M. D. Pa.), where the employer of the witness was a competitor of the party against whom the witness testified. In *Lee Way Motor Freight, Inc.* v. *True*, 165 F. 2d 38, the court below had agreed that a witness may be cross-examined about his membership in an organization of which one of the parties is a member or as to whether he and the opposite party are not adherents of rival political factions. 165 F. 2d at 41.

a bearing on the state of mind of a witness. Cf. *District of Columbia* v. *Clawans*, 300 U. S. 617, 630-31, holding that it was error to restrict the cross-examination of railroad detectives in a prosecution for illegal traffic in train tickets.

The range of evidence which may be elicited for the purpose of discrediting a witness as to his interest, motive, and bias is "very liberal". Wigmore, *Evidence* (3rd Ed., 1940), sec. 944, p. 495. In the application of this principle, no distinction has been made between civil and criminal cases. See the *Clawans* case, *supra*, at 632; *Alford* v. *United States*, 282 U. S. 687, 694; *King* v. *United States*, 112 Fed. 988, 995-96 (C. C. A. 5); *Majestic* v. *Louisville and N. R. Co.*, 147 F. 2d 621, 627 (C. A. 6). As this Court recently observed: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend". *Napue* v. *Illinois*, 360 U. S. 264, 269. But in this case, as in *Alford*, the trial judge "cut off *in limine* all inquiry" into subjects "with respect to which the defense was entitled to a reasonable cross-examination". 282 U. S. 687, 694.

VI. The question of venue.

The court below, in its opinion reversing petitioner's first conviction, App. B, *infra*, p. 78,[31] held that there was venue jurisdiction in the District of Colorado, where petitioner executed and mailed the two affidavits to the Labor Board in Washington, D. C. (R. 42-50; Govt. Exs. 1-6, R. 1242-47). This conclusion is in conflict with *United States* v. *Valenti*, 207 F. 2d 242, in which the Court of Appeals for

[31] The issue was preserved on the second trial by the motion to dismiss the indictment (R. 7-10), the motion for a judgment of acquittal (R. 1093), and the motion for a new trial (R. 24-6).

the Third Circuit held that since the act denounced by Section 1001, read in the light of Section 9 (h), is the act of filing the false affidavit with the Labor Board, no offense is committed until the affidavit is actually filed with the Board.[32]

A. Although no other courts of appeals have had occasion to decide the precise issue, the *Valenti* case was followed in two unreported opinions in the same case which passed on similar problems of venue under indictments alleging the filing of false financial statements with the Department of Labor under Section 9 (g) of Taft-Hartley, *United States* v. *Gibbons and Brown,* Crim. No. 27848 (3) and Crim. No. 28017 (2), E. D. Mo., E. Div. The *Valenti* case has also been aproved in dicta. *Hupman* v. *United States,* 219 F. 2d 243, 247 (C. A. 6), cert. denied, 349 U. S. 953; *United States* v. *Bryson,* 16 F. R. D. 453 (N. D. Calif., S. Div.).

B. The decision of the court below is also inconsistent with a number of cases, arising under Section 1001 (otherwise than in connection with Section 9(h)) and under other statutes, which illustrate the general principle that where the offense relates to the filing of false documents or to the presentation of fraudulent claims, the crime is committed only where the documents are filed or presented to the agency of the government. *Section 1001: United States* v. *Borow,* 101 F. Supp. 211 (D. N. J.). *Filing false tax returns: Bowles* v. *United States,* 73 F. 2d 772 (C. C. A. 4), cert. denied, 294 U. S. 710; *Wampler* v. *Snyder,* 66 F. 2d 195 (C. A. D. C.). *Other statutes: Reass* v. *United*

[32] Valenti was a local union officer, who lived and whose office was in New Jersey, and who, as the officer of a local union, was required to file his affidavit with the regional office of the Labor Board in Philadelphia. Valenti was prosecuted in New Jersey and thus the issue concerning venue was the same as in this case, where petitioner, as a national union officer, was required to file his affidavits with the Labor Board itself in Washington, D. C. (R 13. See also, App. B, *infra,* p. 78, n. 2).

States, 99 F. 2d 752 (C. C. A. 4); *Shurin* v. *United States*, 164 F. 2d 566 (C. C. A. 4). The principle is the corollary to the principle which has been settled since *United States* v. *Lombardo*, 241 U. S. 73, that when a statute requires the filing of a certain document, the offense of failing or refusing to file is committed at the place where the document is required to be filed, not where the accused resides or where he happens to be when he defaults. Cf. *Johnston and Sokol* v. *United States* and *United States* v. *Patteson*, 351 U. S. 215.

C. The court below relied on the continuing offense statute, 18 U. S. C. 3237, for its conclusion that although the filing of the affidavits in Washington completed the offenses, the offenses were begun and continued in the District of Colorado by the making and mailing of the affidavits and therefore could be prosecuted there. App. B, *infra*, pp. 82-3.

Reliance on the continuing offense statute is misplaced. Venue is determined by "the nature of the crime alleged and the location of the act or acts constituting it". *United States* v. *Anderson*, 328 U. S. 699, 703. In this case, the crime under Section 1001, in the light of Section 9(h), is the crime of *filing* a false affidavit with the Board. Until the affidavit is filed, there is no "matter within the jurisdiction" of the Labor Board, as required by Section 1001.

It begs the question, then, to rely on the continuing offense statute. If the offense consists in filing, it is not an offense "begun in one district and completed in another * * *", under Section 3237; it cannot be atomized into a beginning, a continuation, and a completion. It is committed at only one time and at only one place—when the affidavit is filed with the Labor Board in Washington, D. C.

When it has served its argument in another connection in other cases, the government has used this very analysis

as to what constitutes the offense under Section 1001 arising out of the filing of a false affidavit under Section 9(h) and has cited the *Valenti* case in support of the analysis. Thus, in arguing against the application of the perjury rule of evidence in *Gold* v. *United States,* 237 F. 2d 764 (C. A. D. C.), rev'd on other grounds, 352 U. S. 985, the government's brief says (p. 95):

> "Furthermore, it is not the false *swearing* but the *filing* with the National Labor Relations Board of a false affidavit which constitutes the offense defined by 18 U. S. C. 1001 read in the light of 29 U. S. C. 159(h). *United States* v. *Valenti,* 207 F. 2d 242 (C. A. 3). Hence, even where a false non-Communist affidavit is executed, no offense under these sections is committed unless and until the affidavit is filed with the Board. *Id.* at 244.[33]

In passing on a different point in a recent decision, the court below itself adopted the rationale of the decision in the *Valenti* case. In *Sells* v. *United States,* 262 F. 2d 815, cert. denied, 360 U. S. 913, also a prosecution under Section 1001 for the filing of a 9(h) affidavit, the appellant argued that there was a fatal variance between the indictment and the proof because the indictment charged that the offense was committed on or about August 12, 1952, while the proof was that the affidavit was executed on June 3, 1952. (Since Sells was an officer of a local union, he had filed his affidavit at the office of the Labor Board in Denver. There was no issue as to venue because Sells had also executed his affidavit in Denver). In rejecting

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[33] The government made the same argument, also in connection with the perjury rule, in its brief (pp. 48-9) in *Fisher* v. *United States,* 231 F. 2d 99 (C. A. 9).

Even though we agree that the offense is the offense of filing, the perjury rule is still applicable to proof of the false swearing, as we have argued, *supra,* p. 11. Although the crime as such is not committed until the affidavit is filed, the question of falsity presents the central issue of proof.

the contention that this was a fatal variance, the Court cited the *Valenti* case with approval, at 821:

> "However, the crucial act was the filing of the affidavit with the Board on August 12, 1952. Until the affidavit was filed it was not a matter within the jurisdiction of the Board.[34] The pertinent provisions of sec. 1001 apply to one who 'makes or uses' a false writing. Here the use was the filing with the undenied acquiescence of the defendant. There was no variance."

If the "crucial act" is the act of filing the affidavit, in this case it was not an act which was begun or continued in Colorado. The act of filing took place in Washington, D. C.

D. This case illustrates that questions of venue in criminal cases raise "deep issues of public policy". *United States* v. *Johnson*, 323 U. S. 273, 276. Since, like Gold, this petitioner could have been prosecuted in the District of Columbia, this is not the case of an offender who had to be prosecuted in Colorado or not at all. In such a case, it is not wise public policy for the government to have the choice of an alternative place for trial.[35]

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[34] Here, the court cited the *Valenti* case, as well as *Hupman* v. *United States*, 219 F. 2d 243, 247 (C. A. 6), cert. denied, 349 U. S. 953.

[35] Although Sections 9(f), (g), and (h) of Taft-Hartley have now been repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257), the reporting provisions of the new Act (Title II, Sections 201-10), are much more comprehensive and all-embracing than the compliance provisions of Taft-Hartley. All reports are required to be made to the Secretary of Labor. Since the number of persons subject to prosecution under the new Act will be much greater than under Section 9 of Taft-Hartley, the likelihood that the question of venue in this case will also arise under the new Act is also much greater.

Conclusion

For the foregoing reasons, this petition should be granted. However, the attention of the Court is respectfully directed to the pendency of a petition for a writ of certiorari in *Travis* v. *United States*, No. 945, Oct. Term, 1958, in a proceeding under Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the basis of newly discovered evidence relating to the credibility of the witness Gardner. A second such motion, also relating to Gardner, was filed on April 29, 1959 and will be heard in the District Court on October 19, 1959. The petition in No. 945 (pp. 12-13) suggested that the Court defer action thereon pending disposition by the court below of the appeal from the conviction and the filing of this petition (if the conviction were affirmed) and also pending disposition by the courts below of the second motion for a new trial. In its brief in opposition in No. 945 (pp. 11-12), the government advised the Court that it did not oppose this suggestion.

We respectfully suggest, therefore, that the Court defer action on this petition, as well as on the petition in No. 945, until the disposition of the second motion for a new trial by the courts below.

Respectfully submitted,

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APPENDIX A

Opinions Below

August 3, 1959

Before Phillips, Murrah and Lewis, Circuit Judges.

Lewis, Circuit Judge. This action is here on appeal for the second time. On the first appeal,[1] this court set aside a conviction under the false statement statute, 18 U. S. C. A. 1001,[2] and ordered a new trial because of prejudicial error committed when the prosecutor was allowed to improperly cross-examine appellant's character witnesses. The present appeal is from a second conviction after retrial of the case in the United States District Court for the District of Colorado. Reversal is sought upon a claim of insufficiency of the evidence to support the verdict and numerous assertions of prejudicial error committed during the trial. Appellant also challenges the constitutionality of 18 U. S. C. A. 3500 both as to its provisions and as construed and applied by the trial court.

The appellant, Maurice E. Travis, was convicted by a jury on four counts of an indictment charging him with falsely and fraudulently attesting that he was not an affiliate or member of the Communist Party in two "Affidavits of Non-Communist Union Officers" he executed as a national officer of the Internationl Union of Mine, Mill

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[1] Travis v. United States, 10 Cir., 247 F. 2d 130.

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any fales, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10.000 or imprisoned not more than five years of both."

and Smelter Workers.[3] The first affidavit was executed on December 19, 1951, and the other on December 3, 1952, and Mine-Mill filed them with the National Labor Relations Board in compliance with the provisions of Section 9(h) of the National Labor Relations Act as amended by the Labor Management Act of 1947 (29 U. S. C. A. 159(h).)[4]

Following conviction, appellant was fined $2,000 and sentenced to serve a four-year term of imprisonment on each of two counts of the indictment. No fine was imposed as to the remaining two counts, but he was sentenced to four-year prison terms on both to run concurrently with the terms imposed on the other counts. Thus he was sentenced to a total of eight years in prison and fined $4,000.[5]

Since appellant challenges the sufficiency of the evidence we shall summarize that evidence urged by the government as ample basis for the jury verdict. This consists primarily of the testimony of three former Communist Party members who associated with Travis in various capacities as officers of Mine-Mill. Their testimony indicates that in 1942 Travis was employed by Mine-Mill

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[3] Hereafter called Mine-Mill.

[4] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, * * * and no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with the Board an affidavit executed * * * by each officer of such labor organization * * * that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. * * * *"

[5] The judgment giving rise to the instant appeal differed from the judgment at the first trial in that fines of $2,000 were imposed on all four counts at the former trial making a total fine of $8,000.

as coordinator for the area of Northern California. He was at that time a member of the Communist Party with an assignment to carry on the Communist Party activities among the Mine-Mill workers in his area. Thereafter, he advanced to positions of prominent leadership in the Mine-Mill Union becoming Assistant to the President in 1946, Vice President in 1947 and President later that year. He has been Secretary-Treasurer of the Union from 1948 until the time of trial. There was extensive evidence of Travis's activities as a Communist Party member prior to 1949. No prolonged description of his actions will be undertaken here except to point out that as he progressed to positions of national leadership in Mine-Mill he was able to use those positions to further the interests of the Party. Illustrative of the scope of his activities is the evidence that in 1946 the Communist Party designated a group of its members who were prominent Mine-Mill leaders to coordinate the Communist activities within Mine-Mill with a view to controlling the union proper. Although not an official organization of Mine-Mill, this group became known as the "Steering Committee." Travis was one of the initial members of the Steering Committee and its frequent meetings for planning Party strategy and organizing activities within the Union were usually presided over by him "or some other ranking Communist official." His influence in these meetings was notable. On one occasion he stated to the other committee members that since the Party had gained a majority of votes on the Executive Board of Mine-Mill they should effect certain changes in Union staff and that previous actions taken by the anti-Communist faction of the Board should be reversed. These proposals were subsequently adopted by the Mine-Mill Executive Board. On another occasion Travis, as a member of the Steering Committee, participated with national officers of the Communist Party in planning strategy for the selection and support of Party-

approved candidates for the international officers of Mine-Mill. The resultant strategy was later substantially carried out at a Mine-Mill national convention.

In 1947, Congress amended the National Labor Relations Act so as to restrict enjoyment of the collective bargaining advantages of its provisions to labor organizations whose officers had filed affidavits attesting that they were not members of or affiliated with the Communist Party (29 U. S. C. A. 159(h)).

The government introduced into evidence a copy of a public statement made by Travis in the union paper by which he declared that he had resigned from the Communist Party in order to comply with the new Taft-Hartley amendment. It then undertook to show that the resignation was merely a pretense and that in fact Travis's member hip in the Party continued during the period material to this conviction. The evidence in this regard delineated a Communist labor meeting in New York called to decide whether the Party would advocate that its members sign the non-Communist affidavits under the new law. It was decided that Party policy would be against signing. Appellant participated in that meeting. Later, when he reported the decision to Party members of his own union he asked his fellow Communist Gil Green if the teachings of V. Lenin, to the effect that Communists working inside trade unions must remain there at all costs, including the use of artifice or device to do so, were applicable to their situation. Green replied affirmatively and pointed out that labor leaders could circumvent the law by belonging to a Thursday afternoon social club'' since the law pertained only to present membership and not past or future membership.

Following the passage of the non-Communist affidavit requirement of the Taft-Hartley law, the Mine-Mill Executive Board adopted a policy of non-compliance, thereby

exercising its option as provided by the Act. Non-compliance, of course, resulted in inability of the union to receive the advantages of utilizing N. L. R. B. facilities for filing charges of unfair labor practices and participation in Board elections. When it became apparent that loss of advantages to the union was causing difficulty, the Mine-Mill Executive Board by resolution reversed its previous position and adopted a policy of compliance. Travis was a member of the Executive Board when that decision was made. His statement to government witness Mason, set forth *infra*, at the time he wrote his "resignation statement" indicated that his action was in accordance with Communist Party policy. This resignation statement was published in the Union paper on August 15, 1949.[6]

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[6] Excerpts from this public resignation statement illustrate its general tenor:

> "Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided, with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and as a result, I have signed the affidavit.
>
> *"This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist: it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.* (Emphasis in original.)
>
> "The very premise of the Taft-Hartley affidavits is a big lie, the same sort of lie that misled the people of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists

Appendix A—Opinions Below

The government evidence pertaining to appellant's continued Party membership after the resignation statement showed that in the fall of 1951 Travis used government witness Fred Gardner, who had been recently employed by Mine-Mill, to assist him in crossing the border into Canada. Travis explained to Gardner that he was having difficulty crossing the border because of his membership in the Party and the public resignation statement and that it would be easier to cross in Gardner's car because it would not be recognized by Canadian police. He stated that Gardner had come to him well recommended by the Communist Party of Cleveland, Ohio, and that he was glad of that. Travis expressed regret that his public resignation had been necessary in order for Mine-Mill to conform to the Taft-Hartley filing requirements and in discussing this he said that he " * * * believed it was a mistake because it gave the enemies of the Party an op-

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believe. Therefore, I believe that good Communists are good trade unionists."

* * *

"AT THE SAME TIME, I want to make it absolutely clear that my opinion contin ies to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, 'Labor produces all wealth—wealth belongs to the producer thereof,' can lead to the end of insecurity, discrimination, depressions and the danger of war.

"I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror, I am convinced it is responsible for depression, unemployment and the mass misery they generate. * * *"

* * *

"Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union."

portunity to use that in pointing out that this wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits * * *"

Relative to membership after execution of the first affidavit (December 19, 1951), witness Mason testified that in March of 1952 Travis stated to him that the Soviet delegation at the World Federation of Trade Unions in Paris, France, was demanding that the "American left-wing unions" who had been expelled from the Congress of Industrial Organizations form a "third federation." He said that the Communist Party had left it up to those in the unions to make the decisions and asked Mason what his view was. Travis expressed agreement with Mason's response that he opposed such a move and said that "the boys in the other unions" concurred and had left it to him, Travis, to communicate the reply to Paris.

The evidence postdating the execution of the second affidavit indicated that in March 1953 a staff conference of Mine-Mill was held in Denver, Colorado, for the discussion of organizational and political action. At this conference Travis handed to witness Mason a copy of the proposed conference agenda. Mason examined the outline of the legislative program contained therein which listed a number of items such as "repeal of the McCarran Act" and "fight against witch-hunting" and called Travis's attention to the fact that nothing was listed pertaining to betterment of workers. Travis agreed and directed that matters suggested by Mason be included. However, later that day, Travis told Mason "these other things, too, like repeal of the McCarran Act, are important, and he said 'When they get us Communists they will be after people like you if we don't get these laws repealed.' "

In June 1953, witness Gardner was to be transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Travis instructed him to stop in Denver, Colorado, on his way to Idaho for a "briefing

on the Coeur d'Alene situation. Pursuant thereto, Gardner met with Travis in Denver and was told that because of a factional dispute between Communist Party members of Mine-Mill in Coeur d'Alene he was to "remain aloof" from Party activity until further notified. Travis stated that he felt assured that the dispute would be resolved by the expulsion of the leader of the faction opposing the Party regional officers and instructed Gardner that once the problem was resolved he would be contacted by someone whom Travis would identify to him beforehand and that at that time Gardner could reactivate himself in the Party.

In August 1953, witness Mason had a conversation with Travis in Butte, Montana, in which he accused appellant and his Communist Party associates of trying to undermine the leadership of Mine-Mill District Number 1 while they were in the midst of a bargaining conflict with employers. Mason stated that he was aware that this was done because the District 1 leadership opposed Communist domination of Mine-Mill, that some of the men in Montana were very angry about the situation and that he was addressing himself to Travis as the leader of the Party in the union. Appellant made no denials but suggested that he would like to take the matter up with the "boys in Denver." He suggested that Mason meet him in a few days in Denver to talk things over. In compliance Mason met Travis in Denver and again expressed his opposition to various activities in Mine-Mill including his view that the union paper constantly criticized the foreign policies of the United States without once attacking the position of the Soviet Union. Travis answered that Mason's position was in direct opposition to the Party and that he was not being realistic if he thought appellant could change the policies of the paper. Appellant continued, stating that the Communist Party leadership in Mine-Mill felt that there should be no compromises "and that he, Travis,

is one of those in the Party who thinks that there have been too many compromises already, that [Mason did] not grasp the new situation, that the Soviet Union is becoming stronger, and that the position of the Communists in the Union has been stronger, we have been able to, he said, repulse the raid and hold this union and other unions." Mason threatened an open fight on the Communist issue and Travis pointed out that he would have seasoned fighters, the machine and the paper, to use against Mason in such a fight. Travis then concluded the conversation by telling Mason: "You and Joe [Mason's brother] were invited to get into the Party, had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so."

Many of the points raised in appellant's brief were considered by this court in the recent case of Sells v. United States, 10 Cir., 262 F. 2d 815, and need not again be treated at length. As to the evidentiary question involved, the Sells case stands for the proposition that prosecution under the false statements statute is not defeated by a temporary "resignation" for the purpose of signing the affidavits only. Evidence of active participation on a continuing basis both before and after the crucial time of signing and filing the affidavit is sufficient evidence from which the jury might infer that membership continued during the time in question.

Appellant has urged that the perjury rule of evidence must apply to convictions for false statements under Section 1001, 18 U. S. C. A., and that since the government's case is concededly circumstantial the evidence is legally insufficient to sustain the verdict, cf. Rodomsky v. United States, 9 Cir., 180 F. 2d 781; Spaeth v. United States, 6 Cir., 218 F. 2d 361. However, in the Sells case, this circuit followed the view of the 7th and 9th circuits, that the court-established rule governing the quantum of evidence required in a prosecution for perjury, viz.,

falsity of the statement must be shown by the testimony of two independent witnesses or other corroboration, is inapplicable to a prosecution under Section 1001. United States v. Killian, 7 Cir., 246 F. 2d 77; Fisher v. United States, 9 Cir., 231 F. 2d 99; Fisher v. United States, 9 Cir., 254 F. 2d 302; see also Hupman v. United States, 6 Cir., 219 F. 2d 243. Hence, the trial court did not err in submitting the case to the jury without instructing in accordance with the perjury rule.

The evidence of Travis's continued membership in the Party stands uncontradicted. Appellant made no attempt to affirmatively rebut the government evidence on that issue nor did he introduce evidence of his purported resignation. Instead, his defense consisted primarily in extensive cross-examination of prosecution witnesses in an endeavor to impeach and discredit their testimony. He also introduced the testimony of character witnesses as to his reputation for truth and veracity. Of course, the absence of rebutting evidence, is no way relieves the government from meeting the burden of proof. Nevertheless, it is a fundamental principle of appellate review in criminal cases that once the jury has concluded, as it did here, that the guilt of the accused was proven beyond a reasonable doubt, it is not the province nor the function of this court to weigh the evidence or to test the credibility of witnesses. United States v. Green, 7 Cir., 246 F. 2d 155. Furthermore, we are limited in the scope of our review to a determination of whether there is substantial evidence to support the verdict, Wilcoxon v. United States, 10 Cir., 231 F. 2d 384, and must view the evidence in the light most favorable to the government, Evans v. United States, 10 Cir., 240 F. 2d 695. With these principles in mind, a careful review of the voluminous record persuades us that the jury verdict is amply sustained by cumulative proof that appellant's Communist Party membership was not

severed by the purported resignation and that he was a Party member on the dates crucial to this decision.

There is no necessity to consider the sufficiency of the evidence under the "affiliation" counts of the indictment because no fines were imposed thereon and the prison sentences on those counts were made to run concurrently with the prison sentences of the "membership" counts. Lawn v. United States, 355 U. S. 339 at 359, 78 S. Ct. 311, 2 L. Ed. 2d 321; Hirabayshi v. United States, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774; Roviraro v. United States, 353 U. S. 53 at 59, fn. 6, 77 S. Ct. 623, 1 L. Ed. 2d 639.

Appellant contends, but without merit, that the statements of the affidavits, shown by the evidence and found by the jury to have been false at the time they were made, were not "material" because the union did not utilize the N. L. R. B procedures after recognition by the National Labor Relations Board. Recognition was granted the Mine-Mill as a result of the Travis filing among others, which indeed must have been his intent in filing, and the false statement was "capable of influencing the decision of the tribunal in making a determination required to be made," Weinstock v. United States, C. A. D. C., 231 F. 2d 699, 701. The materiality of the false statement is tested not by the union's use of the N. L. R. B.'s facilities but by the union's achievement thereby of a status which carries with it the right to invoke the benefit of the National Labor Relations Act. Sells v. United States, supra.

The government's witness Eckert testified that during the time that he was a member of the Communist Party, 1931 to 1948, it was the continuing policy of the Party "that once having joined the Communist Party you could not leave without being expelled." Defendant objected to the introduction of the evidence, asserting that the testimony was based upon opinion unsupported by facts, that it was unconnected in time with the date of defendant's

resignation in 1949 or the filing of the affidavits in 1951 and 1952, and that it was an attempt by the government to impute guilt by association.

Most assuredly, the evidence was probative of the second side of the question of membership, i.e. whether the Party was willing to accept the defendant and recognize him as a member, and hence admissible, but without more it could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed. As was said by Judge Bazelon in a special opinion written in Gold v. United States, 237 F. 2d 764, rev. on other grounds 352 U. S. 985:

> "If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with sec. 9(h) and the statutory phrase 'is not a member' is precisely equivalent to 'has never been a member'. This possibility Douds specifically rejects." (See American Communications Association v. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.)

Defendant sought to have given to the jury an instruction which could be understood to limit the purpose of the admission of this testimony, but the trial court ruled that, considered with other evidence in the record, the evidence was relevant and probative of whether or not defendant's resignation was a true resignation or a mere sham to obtain the benefits of the National Labor Relations Act for Mine-Mill. Upon this premise, counsel argued to the jury that numerous persons, including the government's witnesses, had left the Party, regardless of the Party's policy.

Whether or not the jury could properly infer from the related evidence that the defendant continued to act in obedience to this policy and that his resignation was under-

stood to be in form only determines whether the court was correct in refusing to circumscribe its use by the jury. 1. Wigmore, Evidence, sec. 13.

In 1948, a meeting in New York City was held among persons of significance in the trade unions and the Communist Party[7] including the defendant and the government witness Eckert, who related what transpired. The National Trade Union Secretary of the Communist Party presided and stated that the purpose of the meeting was to determine whether or not Communist officials in the unions should be granted permission by the Party to sign the non-Communist affidavits. Despite speeches protesting that the unions were not appearing on election ballots because of lack of compliance with the law, it was decided that Communist union men would not sign the affidavits. Travis's reaction to the decision was one of support and obedience. The Mine-Mill adopted the policy of not signing the non-Communist affidavits.

Subsequently, Travis told another government witness, Mason, that the union was becoming more and more concerned because of the losses of elections and that the Communist Party had been again discussing whether the Communist union officials should sign the affidavits. In a second conversation with Mason in July, 1949, Travis offered him a copy of his resignation statement, which was later published in the union's paper, and said that the statement had been cleared with Ben Gold and the Party

[7] In attendance besides Travis and Eckert, were William Z. Foster, National Chairman of the Communist Party, Eugene Dennis, General Secretary, Ben Gold, a member of the Central Committee and an official of the Fur Workers Union, John Williamson, National Trade Union Secretary of the Communist Party, Arnold Johnson, Ohio State Secretary of the Party, and officials of the Farm Equipment Union, Furniture Workers Union and Electrical, Radio, and Machine Workers Union.

people in New York. He told Mason that "the Party thinks this is the best policy for us in the unions to follow."

In October, 1951, Travis had a conversation with the witness Gardner: "* * * we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, * * *"

Thus the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and behavior, and is not analogous to the prohibited imputation drawn from membership alone that a member endorses fully all of the precepts of the Party. Cf. Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; Nowak v. United States, 356 U. S. 660, 78 S. Ct. 955, 2 L. Ed. 2d 1048; Maisenberg v. United States, 356 U. S. 670, 78 S. Ct. 960, 2 L. Ed. 2d 1056.

The charge that Eckert's testimony on this point was opinion unsupported by facts going to the main issue results from a confusion in the record as to whether Eckert was testifying as an expert. Eckert's position of knowing what Party policy was during the time of his membership was shown through evidence similar to that customarily evoked to qualify an expert, but he testified as to a fact within his knowledge rather than giving an opinion as an expert.

The trial court did not instruct the jury that there was a presumption, in absence of contradicting evidence, either that the Party's policy of no resignations continued or that Travis's membership, having been admitted prior to the alleged resignation and inferentially shown subsequent to that time, continued during the time the affidavits were

filed. The factual effect of the evidence was left to the jury. That body might well have drawn an inference unfavorable to appellant. See Jencks v. United States, 5 Cir., 226 F. 2d 540, 547, rev'd on other grounds 353 U. S. 657.

Appellant urges that Eckert's testimony was remote, irrelevant and inflammatory because early in the proceedings defense counsel offered to stipulate that Travis had been a Party member from 1941 to August 1949 and Eckert could show no more than an adherence to Party principles until 1948. Since a man's state of mind must necessarily be shown from his statements and conduct, the prosecution bore the burden of demonstrating a continuation of activities and attitudes similar to those performed and held by Travis during the time of his admitted membership after the date of his purported resignation. The evidence of how extensively, actively and zealously Travis had worked as a Party member and his leadership in the Party was clearly relevant to the question of whether or not the resignation was a mere pretense. If it is true that evidence of Communist Party activities has a tendency to provoke present-day juries toward prejudice, it is ridiculous to suppose that the attitude of the public against a crime will prevent its prosecution. If the evidence has probative value, it is ordinarily admissible regardless of an imagined reaction of the jury, Suhay v. United States, 10 Cir., 95 F. 2d 890.

Appellant insists that the trial court improperly restricted his cross-examination of prosecution witnesses by not allowing him to show that witness Mason was a government informant through fear of deportation and that Eckert and Gardner were members of a labor organization with rival interests to those of Mine-Mill. As to Mason, the evidence showed that he had been a member of the Communist Party for a brief period in the early 1930's. In cross-examining Mason, defense counsel elicited the information that he had become a naturalized citizen in 1938 and that prior to his naturalization the United States Im-

migration and Naturalization Service had questioned him about his past Party membership. The defense then asked Mason if he was again questioned by that Service about the same matter in 1952. The government objected to the question as improper cross-examination and counsel were heard in chambers. The defense argued that it wanted to show that the witness had an interest in testifying. Counsel suggested that Mason knew that Congress passed the McCarran Act providing for deportation of aliens on grounds of past membership in the Communist Party and asserted that it sought to elicit evidence that government agents had held out promises or threats to Mason fo induce him to testify. The government insisted that the purpose of the defense was merely to embarrass the witness. The court then addressed defense counsel as a member of the Bar of the Court and asked if he knew of anything which would substantiate the charge. Defense counsel responded that he had no knowledge of promises or threats but said he had been informed that during the pertinent period the witness was very concerned about his status as an alien and was "going around asking people questions" about it. The court then sustained the government objection stating that it did not think the inference that there were threats or promises was warranted.

Cross-examination of a witness is a matter of right, The Ottawa, 3 Wall. 268, 271, and cannot be circumscribed by the courts where the questions propounded are within the framework of his testimony on direct examination, except to the extent the witness himself claims privilege or constitutional protection. However, the demonstration of a witness's bias almost always requires a search of his conduct and the circumstances of his situation, which facts may be irrelevant to the issues at trial but important to the litigants as a safeguard against false or colored testimony. III Wigmore, Evidence, § 943. Prolonged digressions from

the matters at hand for the purpose of exploring the manners and morals, hopes and fears, beliefs and conflicts of a personality whose connection with the trial occurs merely because of his position as a spectator can as readily abort the process of justice as can a denial of the right of cross-examination. Thus, it has long been held that the scope of cross-examination seeking to discredit the witness may be reasonably limited by the court responsible for the trial of the case. In Blitz v. United States, 153 U. S. 308, 312, 14 S. Ct. 924, 38 L. Ed. 725, where a question seeking to impeach a deputy marshal was not permitted, the court stated:

> "The question was clearly irrelevant, and was properly excluded. The reasons, whatever they may have been, that induced the witness not to arrest the defendant when the latter voted the second time in the same election, did not throw any light upon the issue to be determined. If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose—especially where, as in this case, the question had no reference to any matter disclosed by the examination-in-chief—is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inquiry whether the defendant is guilty or not guilty of the specific offense charged in the indictment."

Certain classes of facts such as family relationship to a party have been held to so strongly give rise to inferences relevant to the witness's interest and bias as to leave no room for an exercise of discretion in admissibility.

III Wigmore, Evidence, § 948. Among these always admissible circumstances is the fact that the witness for the prosecution is under indictment or in custody at the time of trial, Alford v. United States, 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624; District of Columbia v. Clawans, 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843. But these cases do not govern the situation of the witness Mason in the present case and, in fact, reaffirm the view of the Blitz case that, in the absence of an abuse of discretion, the decision of permitting or excluding extrinsic evidence for impeachment purposes rests with the trial judge. As stated by Professor Wigmore, new circumstances will constantly be presented as suggestive of personal prejudice and the trial court must determine whether from the conduct, language or circumstances of the witness a palpable hostility to one party or sympathy for the other is inferable.

The inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record. Mason is a naturalized citizen, not an alien subject to deportation. If wild surmise permit the deduction that he had committed a fraud in his application for citizenship by concealing his membership in a subversive group, which might be used to return him to an alien status, such conjecture is dispelled by his revelations to the Service in 1938. Therefore, we find no abuse of discretion on the part of the trial court in excluding the question as to the witness's more recent contacts with immigration officials.

As to the cross-examination of Eckert and Gardner, appellant argues that it was error for the trial court to sustain objections to questions concerning alleged rivalries between Mine-Mill and the labor organization then employing those two witnesses. The trial court in ruling on the matter expressed the view that any possible inference that could be drawn from a showing of such rivalry

would be too remote to be relevant. In arguing that this was error, appellant cites authorities for the proposition that it is within the proper scope of cross-examination to show that the witness is testifying for his employer,[8] that his employer has an interest in the recovery,[9] is employed by the law firm representing the party for whom he testifies,[10] or when his employer is a business competitor of the party against whom he testifies.[11] He also cites a decision of this court to the effect that it is proper to probe the employment of a witness where he is an adjuster for a group of fire insurance companies, possibly interested in the suit, where the action sought damages for negligent installation of a furnace.[12] However, none of those cases has gone so far as appellant asks that we go here. Each of those cases was a civil action in which the employer had some interest in the outcome of the suit. But this is a criminal action and it is brought against Travis, not against Mine-Mill. What appellant asks is that he be allowed to show rivalry between the unions in order to impute prejudice against Mine-Mill to the witness and then asks the jury to infer therefrom bias against Travis. It is not reversible error to restrict cross-examination questions having only a slight and indirect bearing on the bias and credibility of a witness. District of Columbia v. Clawans, supra. The trial court correctly ruled that the evidence was too remote to be admissible.

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[8] Central Truck Lines v. Lott, 5 Cir., 249 F. 2d 722.

[9] Majestic v. Louisville and N. R. Co., 6 Cir., 147 F. 2d 621.

[10] Lexington Glass Co. v. Zurich General Acc. and Liab. Ins. Co., Ky. App., 271 S. W. 2d 909.

[11] Manley v. Northumberland County, D. C. M. D. Pa., 32 F. Supp. 775.

[12] Theurer v. Holland Furnace Co., 10 Cir., 124 F. 2d 494.

Appellant next complains of the instructions to the jury concerning the meaning of membership in and affiliation with the Communist Party.[13] He argues that the

[13] The trial court instructed the jury as follows:

"Whether or not the defendant was a member of the Communist Party at the times alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those person(s) who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the times alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization;

5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization.

"These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts it is your duty to consider all the evidence either direct or circumstantial which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.

"In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt, that the defendant was a member of the Communist Party on December 19, 1951, and December 3, 1952, as alleged in the indictment, and if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first and fourth counts of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first and fourth counts.

"If, however, you find that the Government has not sustained the burden of proving beyond a reasonable doubt that the defendant was a member of the Communist Party on the dates

definition of "membership" used by the court was so all embracing and vague as to be meaningless destroying as a consequence any distinction between "membership" and "affiliation." We see no substance to this contention. In charging the jury with respect to the components of Communist Party membership and affiliation the trial court carefully followed the directions of this court expressed in the opinion on the first appeal.[14] The instructions were meaningful and clear. They included 11 of the 14 indicia of membership outlined by Congress in Section 5 of the Communist Control Act of 1954 (50 U. S. C. A. 844) and emphasized the primary element of membership as suggested by Mr. Justice Burton in Jencks

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alleged in the indictment, then you must find him not guilty as to the first and fourth counts.

"'Affiliation' as used in the second and fifth counts of the indictment is not the same as membership. The word 'affiliated,' as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"'Affiliation' includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence." (Record 1228-1230)

[14] 247 F. 2d 130, at 135 and 136.

v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed., 2d 1103, i. e.: "* * * there must be present the desire on the part of the individual to belong to the Communist Party and recognition by that Party that it considers him as a member." This adequately outlined the kind of acts that could be considered evidence of membership and included the idea of the continuing reciprocal relationship necessary for that status.

The jury was told that Travis's membership in the Communist Party at the times alleged in the indictment was to be determined from "all the evidence in the case" and that they were not limited solely to consideration of the indicia of membership enumerated by the court. However, this in no way indicates, as appellant contends, that the jury was told it was free to consider anything in evidence as proof of membership. The court went on to clarify: "* * * it is your duty to consider all the evidence * * * *which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.*" (Emphasis added). Furthermore, it must be presumed that the jury, after such careful instructions on the components of membership, is perfectly capable of separating evidence which tends to prove membership from evidence which does not. Appellant also argues in this connection that the instructions left the jurors free to use single items of evidence standing alone as the basis for their findings. Such was not the case. They were instructed that isolated acts or statements were circumstances they could consider, but were cautioned that these were not in themselves conclusive proof of membership and were only to be considered in connection with the other evidence, that they were to weigh all the evidence bearing on the crucial issues, and that the government retained the burden of proving guilt beyond a reasonable doubt.

Nor is there any merit to the contention that the jury was left free to infer membership at the time of signing the affidavits from appellant's past Party membership or from the conclusion that the resignation was not honest. The instructions clearly contravene this argument:

> "The crucial issue of fact in this case is whether on December 19, 1951, and December 3, 1952, Maurice E. Travis was or was not then a member of the Communist Party or affiliated with such party.
>
> "The affidavits do not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past either a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavits would be entitled to sign the affidavits under oath without violating the law.
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> "Since the affidavits speak in the present tense only, the fundamental issue of fact for you to decide is whether or not at the times alleged in the indictment the defendant knowingly and wilfully used an affidavit which was false and which he knew to be false at that time."
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> * * *
>
> "You may not presume the existence of a fact and then infer from such presumed fact the existence of any other fact or circumstance. You may not infer from any presumed fact or facts that the defendant is guilty of any of the offenses charged in the indictment."

It is urged that the trial court should have clarified what bearing the pre-affidavit and post-affidavit evidence had on guilt and that it should have pointed out which

evidence was relevant to each affidavit. We do not agree. The court should not be required to emphasize particular portions of the evidence. To require trial courts to suggest to the jury the inferences which may be drawn from the evidence would be to invite error. Radius v. Travelers Ins. Co., 9 Cir., 87 F. 2d 412. Further, it would be an invasion of the province of the jury to judicially measure the weight of circumstances which the jury can determine equally as well. Majestic v. Louisville & N. R. Co., 6 Cir., 147 F. 2d 621.

Further error is alleged in the refusal of the court to give several requested instructions. We shall not lengthen this opinion by discussing appellant's many contentions in this regard. It is sufficient to say that the instructions given to the jury were complete and proper. Moreover, the jury was admonished with particularity as to all the safeguards that should properly surround a criminal prosecution. The rejected instructions added no proper charge which was not covered by those actually given and there was no error in refusing to give them.

After each of the government witnesses had testified on direct examination at the trial, appellant moved that the prosecution be required to produce all reports and statements previously made by those witnesses to any agent of the government as provided under 18 U. S. C. A. 3500. The motions were granted but since the government claimed that the statements of each witness contained matter not related to the subject matter of his testimony as a witness, the trial court, pursuant to Section 3500(c), examined the statements *in camera* and excised the unrelated matters before delivering them to appellant.

Appellant's claims anent the constitutionality of section 3500 were examined fully in the Sells case, supra. Inasmuch as the availability to the defense of documents held by the government is limited under the decision of Gordon v. United States, 344 U. S. 414, 73 S. Ct. 369, 97

L. Ed. 447, and Jencks v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, to matters relevant to the testimony of a witness for the prosecution, Section 3500 merely provides the procedure by which that relevancy may be determined and deprives the defendant of nothing to which he was formerly entitled. Of course, the excised portion of a statement must be available for review to test the correctness of the trial court's judgment in eliminating it from consideration by the defense.

The United States Supreme Court has held in recent decisions, Palermo v. United States and Rosenberg v. United States, decided June 22, 1959, that Section 3500 is constitutional and governs the rights of a defendant to the production of documents in the hands of the prosecution. Further, the court approved the *in camera* inspection by the trial court as the proper procedure to be followed in determining the application of the statute to the particular statements sought by the defense. We have carefully examined and compared the complete documents and the documents as they were submitted finally to the defense and conclude that the only excised portions related to matters and persons not connected with the present case.

Counsel for appellant has skillfully anticipated a great many problems which will yet arise before the administration of Section 3500 is stablized by precedent. Most of these problems are not made ripe for decision under the present case.

Appellant suggests that the trial court delegated its responsibility for the determination of whether or not certain documents contained "statements" within the purview of Section 3500(e) which should be made available to the defense. He contends that if the prosecution determine that no part of a statement relates to the subject matter or, if it does, that it is not a "statement" as defined in subsection (e), then the trial court never inspects the statement at all and it is not preserved for the record. "There is

appellate review if only part of a document is withheld from the defense; none, if the entire document is withheld." This problem was foreseen by the United States Supreme Court in the Palermo case, supra, and the production by the government of doubtful writings and in camera determination of the subject matter and whether it comes within the definition of "statement" of subsection (e) was approved. This ruling, however, does not aid appellant for the record shows merely that the three witnesses, Eckert, Mason, and Gardner, had talked with government attorneys in preparation for this case and that Eckert had talked to an investigator for a congressional committee. The subject of these conversations was Travis and Mine-Mill, but there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted or approved any writing or that any recording was made of any oral statement made to these agents. It is presumed that these agents took notes or made summaries of their conversations with the witnesses but such interpretations would not be "statements which could properly be called the witness' own words," Palermo v. United States, and the witnesses denied signing or adopting any such statements.

Appellant moved for the production of the witnesses' testimony before one or more grand juries. The theory that either the Jencks decision, Jencks v. United States, supra, or the Jencks Act, Section 3500, encompass grand jury testimony was discarded in Pittsburgh Plate Glass Co. v. United States (U. S.) decided June 22, 1959. Unlike the appellant in that case, however, appellant here moved the court for inspection of the grand jury minutes as a matter of right and alternatively to have the minutes produced for the court's examination and determination whether inconsistencies appeared between the witness's testimony before the grand jury and his testimony at trial.

Thus, the question here is the one particularly left undecided by the Pittsburgh Plate Glass case: Whether the

trial court may, in the discretion granted him under Rule 6(e), Fed. Rules Crim. Procedure, refuse to examine the transcription of the grand jury when requested to do so. Rule 6(e) provides:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. * * *"

It has been held that instances when the need for disclosure of grand jury proceedings outweighs the countervailing policy maintaining the secrecy of such proceedings must be shown with particularity, United States v. Procter & Gamble Co., 356 U. S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077. The burden is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy, Pittsburgh Plate Glass Co. v. United States, supra. Thus, where some portion of a defendant's testimony was impeached by the government's use of her grand jury testimony, it has been held that the trial court should make an inspection of all of her testimony for the purpose of disclosing other inconsistencies to the use of a co-defendant, United States v. H. J. K. Theatre Corporation, 2 Cir., 236 F. 2d 502, but this is a far cry from requiring a trial court to examine all of the testimony of all of the witnesses for the prosecution upon the defense's hope of thereby un-

covering some inconsistency. In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

Since the permission or refusal of a defense inspection of grand jury minutes rests in the discretion of the trial court, United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, and since no showing was made of a particularized need for the grand jury minutes in the maintenance of the defense, Pittsburgh Plate Glass Co. v. United States, supra, we hold that the trial court did not abuse its discretion in failing to order the production of grand jury minutes in this case where difficulties have arisen not from the paucity of evidence but from its plethora.

Affirmed.

MURRAH, Circuit Judge, dissenting. In the first place, I would apply the perjury rule for the reasons so well stated by Judge Bazelon in Gold v. United States, 237 F. 2d 764. As in that case, the charge is false swearing, the evidence is indeed indirect and circumstantial, and in my judgment inconclusive. The only reason assigned for the inapplicability of the ancient and accepted perjury rule requiring direct and positive evidence of guilt, is that in cases of this kind, its application would "merely thwart the attainment of the end which Congress sought to accomplish by the enactment of Paragraph 9(h)." See Sells v. United States, 262 F. 2d 815. But there is nothing in the legislative history of Section 9(h) to indicate that the Congress entertained the view that the perjury rule was inapplicable to prosecutions under Section 1001, as in Section 1621. See Judge Bazelon in the Gold case, Note 17. While feeling myself bound by the pronouncements of my court in the Sells case, I cannot refrain from expressing the hope that such is not the law in cases of this kind.

I would reverse this case and remand it for a new trial for the refusal of the trial court to examine the grand jury evidence in camera, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice. We know that grand jury testimony may be disclosed only upon a showing of a particularized need, and the burden of showing that need is on the one seeking it. But if the rule is to have any efficacy, its burdens ought not to be insurmountable.

How then may the accused lay a foundation for requisite inconsistency when he does not have access to the testimony of any other means except cross-examination in the hope that something will turn up? In our case the cross-examination of the prosecuting witnesses disclosed that they had testified in numerous cases of this

kind, as well as before the grand jury which has indicted the accused. There were some inconsistencies in the testimony they had given in other open proceedings. But there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court.

It is for these reasons that we have committed to the trial court the judicial function of determining ex parte whether the testimony of the witnesses is substantially consistent. And, the court cannot exercise that important function unless he knows something of the witnesses' testimony. It would seem therefore that the trial court erroneously and prejudicially refused to take a judicial look at the grand jury testimony. Cf. United States v. Spangelet, 258 F. 2d 338. It may be that we would be justified in having the grand jury testimony certified for examination here, as was done in United States v. Lev, 258 F. 2d 9. Unless it is done, I certainly can't say that it was harmless error to refuse to look at it.

This case is important, not only to the accused here, but as a guiding precedent in other cases. I do not believe we can dispose of the question by simply saying that it was harmless.

APPENDIX B

Opinions Below, Reversing Petitioner's First Conviction

(Travis v. United States, 247 F. 2d 130)

July 15, 1957

Before PHILLIPS, MURRAH and LEWIS, *Circuit Judges*

LEWIS, *Circuit Judge.* The defendant was indicted in the United States District Court for the District of Colorado upon six counts alleging violation of the false statement statute, 18 U. S. C. 1001.[1] The Government dismissed two counts before trial and defendant was found guilty upon each of the remaining counts. The basis of defendant's conviction lies in the falsity of two "Affidavits of Non-Communist Union Officer" in which he swore he was "not a member of the Communist Party or affiliated with such party." Each of the affidavits was executed by defendant in Denver, Colorado, and mailed from Denver to the National Labor Relations Board in Washington, D. C. where they were received and filed pursuant to 29 U. S. C. 159(h).[2] Defendant was an officer of the International Union of Mine, Mill and Smelter Workers and it is agreed that the making and filing of the affidavits is a matter within the jurisdiction of an agency of the United States and that during the life of the affidavits Mine-Mill was in compliance with sections 9(f), (g) and (h) of the Labor Management Relations Act of 1947 and used the facilities of the N. L. R. B.

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[1] The court quoted Sec. 1001.

[2] The court quoted Sec. 9(h), and then pointed out:
"Travis was a national officer of Mine-Mill and was required by regulation and instruction of the N.L.R.B. to file with the Board in Washington."

Appendix B—Opinions Below, Reversing Petitioner's First Conviction

Upon conviction defendant was sentenced to imprisonment for four years on each of two counts, to run concurrently, and for four years on each of the other counts, to run concurrently, a total of eight years. Fines totaling $8,000 were also imposed.

Defendant on appeal does not challenge the sufficiency of the evidence to support conviction but seeks reversal upon claim of lack of jurisdiction in the Colorado court and numerous assertions of errors occurring during trial.

Since we conclude that a new trial must be granted we limit our consideration to matters requiring reversal and those contentions of appellant which will necessarily recur on retrial.

Travis did not testify at the trial and as a consequence his contemporary credibility was not at issue. He did, however, call as character witnesses four persons each of whom stated that Travis's general reputation for truth and veracity was good. Upon cross-examination, over objection, the trial court allowed the credibility of the character witnesses to be tested by inquiry as to whether or not the witnesses had heard: (1) that Travis had been convicted of criminal contempt of court in Grant County, New Mexico, and (2) that when Travis had been asked before the McCarran Committee of the United States Senate in Salt Lake City in October, 1952, if he was at that time a member of the Communist Party, he had refused to answer on the ground that it would incriminate him.

Before overruling objection to the questions the trial court very properly made inquiry as to the factual background of the assumptions contained in the questions. Both occurrences were admitted by Travis to be actualities, the criminal contempt conviction arising as a result of a labor dispute.

Appendix B—Opinions Below, Reversing Petitioner's First Conviction

In Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168, it is said, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." In attempting to prove a good reputation for truth and veracity Travis placed in issue those characteristics determinative of his capability of the commission of the crime charged—false swearing in a labor matter. Since lack of veracity is the very essence of the indictment of Travis an attempt by him to negative the existence in him of those traits existent in one guilty of such an offense places in issue all characteristics affecting reputation which explore the crime itself and the ability of the accused to commit the crime. So viewed, inquiry from the witness as to his knowledge of Travis's conviction for criminal contempt is relevant and as Michelson holds, inquiry is proper although "the crimes may be unalike, but both alike proceed from the same defects of character which the witness said the defendant was reputed not to exhibit." Those defects of character which would lead one to disregard the lawful order of the court in a labor dispute may well be the same defects which might lead one to falsely swear to the affidavits upon which the instant prosecution is based. See Hawley v. United States (10 Cir.) 133 F. 2d 966.

But the reasoning of Michelson clearly negatives the relevancy of examination relative to Travis's claim of constitutional privilege before the McCarran Committee. One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to

protection. Cross-examination probing the witnesses' knowledge of Travis's claim of constitutional immunity during the McCarran hearing had, we believe, no proper probative value but if such existed it was, as stated by Mr. Justice Harlan in Gruenwald v. United States (decided May 27, 1957), "far outweighed by its impermissible impact upon the jury", had "grave constitutional overtones", and was fraught with "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt * * *." The admission of this evidence necessitates a new trial. Gruenwald v. United States, supra; Curcio v. United States (decided June 10, 1957).

But appellant insists that the action should be dismissed in its entirety for lack of venue jurisdiction in Colorado. As noted, it is unquestioned that Travis executed and mailed the affidavits at Denver, Colorado. It is appellant's view that his "making and using" the false document was completed in Colorado, prior to the time when such activities became "a matter within the jurisdiction of any department or agency of the United States" and hence a federal crime. For this reason, he maintains that 18 U. S. C. 3237, known as the continuing offense statute, which provides that any offense against the United States begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued, or completed, does not apply. He neglects, however, to point out any possible use to which such a false affidavit might be put other than as a filing with the N.L.R.B. in Washington, which was his intent and his consummated purpose.

In the case of United States v. Valenti (3 Cir.) 207 F. 2d 242, the Third Circuit held that the act denounced by Section 1001 is the filing of a false noncommunist affidavit with the Board and that no crime is committed until the

affidavit, through its filing, has become the basis for action by the Board. Also, although the concurring opinion suggests that the case is based upon a failure of proof of mailing, the majority clearly holds that constructive filing by deposit in the mails is not sufficient to lay venue at the place of deposit. The court's rejection of the government's contention that the continuing offense statute should apply claims support in language of United States v. Lombardo, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897. In the Lombardo case, the crime committed was a failure to file a required statement with a government agency and the Supreme Court understandably held that the accused could not be prosecuted at the place of his residence on the theory that the failure to deposit the statement in the mail is the beginning of a continuing offense. The distinction between a situation where the accused fails to file and one where he makes a false affidavit with the intent to file it with the Board and entrusts it to an irrevocable agency for that purpose is clear.

While we recognize the important issues of public policy involved in the setting of venue and the necessity of maintaining a taut rein against possible abuses by the prosecution and hardship to the defendant in a trial far from his abode, United States v. Johnson, 323 U. S. 273, 65 S. Ct. 249, 89 L. Ed. 236, it appears that such considerations are not present here and that this situation is precisely the one which Congress intended to reach by the continuing offense statute. This statute was applied in connection with Section 1001 in De Rosier v. United States (5 Cir.) 218 F. 2d 420, the court stating:

> "* * * When the letter containing the false statements and the fabricated document was prepared and forwarded to the Loyalty Board, there was set in motion the events culminated in the commission

> of the offenses charged. It would be an excess of literalism to say that the appellant was only preparing to commit the offense, and that the actual commission thereof had not in fact begun at the time and place from which the letter was sent, mailed, or forwarded to the Board. It is no answer to say that, by some fortuitous circumstance, the consummation of the crime might have been frustrated by the loss of the letter in transit, thereby rendering ineffectual the attempt to deliver the false statements. Necessarily, the commission of the offense must be viewed in retrospect. It is often not easy to draw a line between attempt and preparation; the former is such an intentional preparatory act as will apparently result, if not extrinsically prevented, in a crime which it was designed to effect."

The facts of this case parallel those of the De Resier case. 18 U. S. C. 3237 permits prosecution in any district where the offense was begun, continued, or completed and, therefore, venue was properly laid in the District of Colorado.

Appellant next contends that the indictment was fatally defective as duplicitous and in fact repugnant in its charge. Counts 1 and 2 of the indictment charged respectively that appellant filed a "false writing" with a government agency stating that he was not "then and there a member of the Communist Party" and that he was not "then and there affiliated with the Communist Party" on December 19, 1951. Counts 4 and 5 charged the same respectively as to December 3, 1952. Since, appellant argues, membership and affiliation are different statuses no person could hold both at the same time (repugnancy) and since, so says appellant, membership necessarily includes affiliation he is twice charged with the same offense. The obvious an-

swer to appellant's contention lies in the false premise of his argument. He is not charged with being a Communist nor with being affiliated with the Communist Party, but rather with having falsely represented that he held neither of these statuses.[3]

Various means used in committing the offense charged may be joined without duplicity. Silkworth v. United States (2 Cir.) 10 F. 2d 711. "Duplicity" in an indictment generally means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. Frankfort Distilleries v. United States (10 Cir.) 144 F. 2d 824, reversed on other grounds, 324 U. S. 293. And, where a statute creates a single offense, but specifies in the alternative different acts, any one of which will constitute the offense, an indictment may charge the commission of such offense by all the means mentioned, using the conjunctive "and" wherever the statute uses the word "or" without being duplicitous. United States v. Dombowski (D. C. Mich.) 252 F. 894. His objections to the indictment must also fail if the indictment charges two offenses because

> "* * * a draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the

[3] The Ninth Circuit has held that an accumulative sentence may not be levied for separate counts alleging false denials of membership and affiliation, Fisher v. United States, 231 F. 2d 99. Since we are granting a new trial we consider this question presently premature.

various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense." United States v. Universal C.I.T. Credit Corp., 344 U. S. 218, 73 S. Ct. 227, 97 L. Ed. 260.

Finally appellant complains of the court's instructions particularly as they define membership and affiliation. The trial court instructed:

"Membership in the Communist Party is the state or status of being one of those persons who belong to or compose that party. Not every relationship between an individual and an organization constitutes membership. An individual may be sympathetic or agree with all or part of the program of an organization and still not be a member. Isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with Communist Party or with its aims or policies are not conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in the case.

"The word 'affiliated', as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a

> mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.
>
> "Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.
>
> "Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you ladies and gentlemen are to determine from all the evidence in the case."

We believe the court's instructions on the meaning of affiliation to be proper. However in Jencks v. United States, decided June 3, 1957, Mr. Justice Burton criticized an instruction as to what constitutes membership, pointing out that the instruction failed to emphasize that the primary essential of membership is the desire of the individual to belong to the group and the recognition by the organization that it considers him as a member, and cited with approval Fisher v. United States, 231 F. 2d 99, 106-107. That case held that the jury should have been reminded of the components of the term membership rather than be supplied with synonyms. Under the Communist Control Act Congress has outlined fourteen indications of membership which the jury shall consider, upon the presentation of such evidence, in determining whether the accused is a member of the Communist Party, 50 U. S. C. A. 844. Certainly these indicia of membership may be shown through circumstantial evidence, as any other fact, but the facts thus established must show more than cooperation or sympathy with the Party's pol-

icies, which would be equally persuasive of mere affiliation. The instruction should be made more explicit upon the new trial.

Reversed and remanded for new trial.

MURRAH, Circuit Judge (concurring specially). I concur in the opinion of the court with one exception. I also think it was improper and prejudicial to allow the government to inquire of the character witness concerning the defendant's prior commitment as for contempt of court. Certainly one may "be committed as for contempt upon facts which would have no bearing upon his honesty or integrity * * *" State v. Sexsmith, 57 P. 2d 1249, 1252. There was nothing in the content of the question to indicate that the defendant's conviction for contempt of court bore any relationship whatsoever to his truth and veracity—the trait of character in issue.

APPENDIX C

Statutes Involved

1. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. 29 U. S. C. 159 (h) (Section 9 (h) of Taft-Hartley) provides:[1]

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits.

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[1] Repealed by Section 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257).

3. Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844, provides:

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

4. 18 U. S. C. 3500, the so-called "Jencks" law, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any

statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such por-

tion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

5. 18 U. S. C. 3237, the so-called continuing offense statute, provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

APPENDIX D

Judgment Below

Forty Fourth Day, May Term, Monday, August 3rd, 1959.

Before Honorable Orie L. Phillips, Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Maurice E. Travis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.